

# **“Where Have All The Cowboys Gone?” Marriage and Breadwinning in Postindustrial Society**

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*In this Article, Marion Crain examines the recent resurgence of nostalgia for the strictly-defined gender roles of the past. Moving beyond the frameworks used by liberal and conservative scholars, Professor Crain analyzes this phenomenon by evaluating various family law reform proposals as specific responses to the perceived breakdown of ordered gender roles and the apparent nonviability of dual-breadwinner, dual-caregiver marriages. Ultimately, Professor Crain argues that specific employment law reforms, including reducing the current forty-hour-per-week norm of full-time employment and facilitating the integration of paid work and family life would support the dual breadwinner/caregiver marriage rather than undermining it.*

## **I. INTRODUCTION**

“I will do the laundry, if you pay all the bills. . . .

I will raise the children, if you pay all the bills. . . .

I will do the dishes while you go have a beer.

Where is my John Wayne?

Where is my prairie son?

Where is my happy ending?

Where have all the cowboys gone?”<sup>1</sup>

Dramatic changes have occurred in the traditional gender order over the last twenty-five years. One of the most striking is the increased presence of women in the waged labor market.<sup>2</sup> This change in turn impacts upon the institution of marriage. The traditional male breadwinner/female homemaker model that once shaped duties and expectations in marriage is giving way to a model in which men and women function as coequal breadwinners.<sup>3</sup> The shift to a coequal

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<sup>1</sup> PAULA COLE, *Where Have All the Cowboys Gone?*, on THIS FIRE (Wea/Warner Brothers 1996).

<sup>2</sup> By 1993, 73% of women aged 25–34 and 76% of women aged 35–44 were in the waged labor market. See Paul Osterman, *Work/Family Programs and the Employment Relationship*, 40 ADMIN. SCIENCE Q. 681, 683 (1995).

<sup>3</sup> The Bureau of Labor Statistics reports that 53.4% of all married couples had two income

breadwinner model inevitably impacts family life and parenting.<sup>4</sup> When mothers as well as fathers work full time, the job of homemaking-caretaking must be added on top of the demands of the waged job, reduced, or shared.<sup>5</sup> Despite some progress toward gender equity in this area, women continue to perform the lion's share of the homemaking and caretaking duties.<sup>6</sup>

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earners in 1997. Steve Teske, *Number of Dual Income Families Continues Growing*, *BLS Reports*, Daily Lab. Rep. (BNA) No. 99, at D-3 (May 22, 1998). Other researchers place this figure even higher. See Anne E. Winkler, *Earnings of Husbands and Wives in Dual-Earner Families*, Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1998) (estimating that 61% of all married couples are dual-earner couples). By 1998, only 19.2% of married couples conformed to the male breadwinner/female homemaker model. See *Family with Only Husband Working Just 19.2 Percent of Married Households*, Daily Lab. Rep. (BNA) No. 101, at D-1 (May 26, 1999).

Working women contribute a significant portion of their families' incomes. One survey found that almost half of employed married women (48%) provide at least 50% of their household's income; 18% are their household's sole provider. See Tamar Lewin, *Women Are Becoming Equal Providers*, N.Y. TIMES, May 11, 1995, at A27. The survey's results are supported by earlier data from the Bureau of Labor Statistics, which showed that in 1993, women who worked full time contributed a median of 41% of the household income, up from 39% in 1987. In 23% of dual-income married couple households, women outearned men. See *id.*; see also Winkler, *supra*, at E-1, E-5. Marriages in which the traditional arrangement is reversed, with women functioning as the primary breadwinners for their families rather than men, are disproportionately prevalent where the husband's income lies near the bottom of the income scale; wives outearned their husbands in 60% of these marriages. *Id.* at E-4.

<sup>4</sup> Married mothers are twice as likely to work full time all year than their mothers were twenty years ago. Seventy-seven percent of the mothers of school-aged children are working. Sixty-three percent of mothers with children under two years of age were in the labor force in 1996. See *id.*; see also Kirstin Downey Grimsley & R.H. Melton, *Full-Time Moms Earn Respect, Poll Says*, WASH. POST, Mar. 22, 1998, at A16.

Several explanations have been advanced for this phenomenon: changes in cultural expectations regarding women's market roles; growth in women's income, so that mothers contribute a significant proportion of family income; a tendency for women to marry later, give birth later, and have fewer children; and market conditions such as inflation, high male unemployment rates, and slow wage growth. See Howard V. Hayghe & Suzanne M. Bianchi, *Married Mothers' Work Patterns: The Job-Family Compromise*, MONTHLY LAB. REV., June 1994, at 24, 26-27.

<sup>5</sup> In 1998, both parents were employed in 64.1% of married-couple families with children under 18 years of age. Only 28.9% of two-parent families with children under 18 years featured an employed father and a homemaker mother. See *Family With Only Husband Working Just 19.2 Percent of Married Households*, *supra* note 3, at D-1.

<sup>6</sup> Nine out of ten women surveyed said that the responsibility for child and family caretaking in their households fell to them. See generally Lewin, *supra* note 3. See also Cynthia Starnes, *Reflections on Betty Crocker, Soccer Mom and Divorce: A Message from Detergent Manufacturers*, 1997 WIS. L. REV. 285, 287, 289-90 (observing that most women still function as primary caretakers for children whether or not they are employed in the wage

While men and women generally agree that the trend toward sharing the breadwinner role and renegotiating caretaking roles in the family sphere has enriched both sexes, many also feel that today's gender-neutral ideal of having it all—a happy marriage, family, and a successful career—is unattainable. Financial pressures, time constraints, and the reality that children, domestic chores, and family life are squeezed in the struggle to juggle work and family obligations, leave parents and spouses feeling stressed, frustrated, and guilty. A nostalgia for bygone days of family life has surfaced: A recent survey found that two-thirds of men and women believed it would be best for women to stay home and care for family and children, and forty percent of respondents wished for a return to the settled gender roles of the past.<sup>7</sup>

Longings for 1950s-style gender roles are reflected not only in survey results and in the lyrics of popular songs, but also in the way we interpret social phenomena such as the divorce rate, parenting deficits, and the breakdown of family structures. This Article explores our response to such phenomena through family law reforms designed to move us backward in pursuit of traditional “family values,” a breadwinner/homemaker model, and marital permanence. It suggests that a more effective strategy would move us forward by altering the structure of employment and the values that are privileged in the market to accommodate dual-earner couples and the new gender order.

Part I outlines the perceived crisis in the institution of marriage and the practice of parenting, the reasons advanced for it in the popular press, and the proposals for family law reform which it has spawned. Part II examines alternative explanations for the destabilization of marriage—specifically the crumbling of the old male breadwinner/female homemaker ideal associated with the rise in women's paid employment, the challenge it poses to the gender order, and the tensions it has produced within the family. Part III inquires whether such tensions are inextricably intertwined with market shifts and thus might more effectively be addressed by dismantling the formal separation between home and family and the market, and discusses the resistance to doing so. Part IV outlines specific employment law reforms that would support the dual breadwinner/caregiver marriage rather than undermining it, including reducing the current forty hour per week norm of full-time employment, and facilitating the integration of paid work and family life.

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labor market, and citing studies documenting the division of household labor between husbands and wives).

<sup>7</sup> See Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat: Poll Shows Sexes Agree on Pros and Cons of New Roles*, WASH. POST, Mar. 22, 1998, at A1; see also Grimsley & Melton, *supra* note 4, at A16.

## II. MARRIAGE—AN INSTITUTION IN CRISIS

Apocalyptic predictions regarding the demise of the American nuclear family and the erosion of the institution of marriage abound in the popular press.<sup>8</sup> Marriage, warns commentator Maggie Gallagher, is disappearing.<sup>9</sup> The rising divorce rate and declining number of two-parent nuclear families have been blamed for a variety of American social ills, including crime, poverty, welfare dependence, homelessness, educational stagnation, and child abuse.<sup>10</sup> Some have gone so far as to characterize marital instability as the greatest threat to the American dream, and the major cause of downward economic mobility.<sup>11</sup>

In this Part, I outline the scope of the perceived crisis in the institution of marriage, the reasons advanced for the crisis by commentators who have been instrumental in triggering legal reform, and the legislative proposals which have surfaced.

### A. *The Scope and Nature of the Crisis*

Nearly all "postindustrial" nations are plagued with high divorce rates.<sup>12</sup> The United States is no exception: By 1989, the divorce rate was 4.8 per thousand population, one of the highest divorce rates among postindustrial countries.<sup>13</sup>

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<sup>8</sup> See, e.g., DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997); William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12, 12-26; Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993 at 47, 47-84.

<sup>9</sup> See GALLAGHER, *supra* note 8, at 127-28.

<sup>10</sup> See, e.g., BLANKENHORN, *supra* note 8, at 1 ("Fatherlessness is the most harmful demographic trend of this generation. . . . It is the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women."); GALLAGHER, *supra* note 8, at 3-4, 36-37 (asserting that children of single or divorced mothers are more likely than children in intact biological families to have been physically abused by their mothers or sexually abused by their mothers' boyfriends or second husbands); WHITEHEAD, *supra* note 8, at 7-8 (blaming the rising divorce rate for economic insecurity and disadvantage for children of divorce, fragile and unstable families, and disinvestment of parental time and money in children).

<sup>11</sup> See GALLAGHER, *supra* note 8, at 31-33 (arguing that the fragility of marriage and the rising divorce rates are "associated with persistent decline: declining health, declining fortune, declining physical safety, declining psychological security, declining education, and declining job attainment"); WHITEHEAD, *supra* note 8, at 183 (arguing that divorce is connected with downward mobility and poverty for the middle class generally and for women in particular).

<sup>12</sup> See WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 336 (1993).

<sup>13</sup> See JOSEPH GUTTMANN, *DIVORCE IN PSYCHOSOCIAL PERSPECTIVE: THEORY AND*

This is a marked increase from the years prior to 1946, when the divorce rate was 2.0 or less; in 1946 the rate climbed to 4.3 per thousand, and then sharply declined until 1958, when it began to increase again. Another rapid surge occurred in the late 1960s, and divorce rates peaked in 1979 and 1981 at 5.3 per thousand.<sup>14</sup>

The high divorce rate in the U.S. is viewed as a social crisis demanding a legal response. First, divorce leaves women and children impoverished. Second, divorce is associated with emotional distress for children and adults because it interrupts and diminishes the noncustodial parent's relationship with the child, and disrupts the child's ties to friends, neighborhoods, and educational institutions. Finally, divorce undermines marriage, a fundamental social structure that serves as the bedrock for our political and economic systems.

### 1. *Impoverishment of Women and Children*

Despite the fact that marriage is no longer an economic necessity for women, most women—particularly those who retain custody of their children—face economic hardship following divorce.<sup>15</sup> In 1992, 39% of all divorced

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RESEARCH 4 (1993). This "crude rate" tends to understate the divorce rate because the 1000 person population figure includes children and adults who lack divorce potential. Nevertheless, it is thought to be the best measure of divorce available because it avoids overstating the divorce rate which occurs when using a ratio of the number of marriages to the number of divorces in a given year (effectively comparing two different populations and implying that the marriages ending in a given year are those contracted in that year, which is typically not the case). *See id.* at 3–4.

<sup>14</sup> *See* GUTTMANN, *supra* note 13, at 4.

<sup>15</sup> The correlation between women-headed households and poverty is undeniable, and scholars from the left and the right agree upon it. *See* Linda J. Lacey, *As American as Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers, and Welfare Rhetoric*, 82 CORNELL L. REV. 79, 94 (1996) (book review) (pointing out agreement on this point between feminist Martha Fineman and conservative fathers' rights advocate David Blankenhorn).

There exists considerable debate, however, regarding the extent of women's economic disadvantage following divorce. Generally, women's economic well-being declines following divorce while men's improves. Lorraine Weitzman's analysis of men and women's financial positions one year after divorce showed that women experienced a 73% decline in their standard of living after divorce, while men experienced a 42% improvement. *See* LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1249–51 (1981). Subsequent studies have indicated that while Weitzman was correct in her overall conclusion that women lose economically following divorce while men gain, her findings as to the magnitude of the losses and gains were greatly exaggerated. *See generally* Greg J. Duncan & Saul D. Hoffman, *A*

women with children lived below the poverty level.<sup>16</sup> Since children of divorce are typically in their mothers' custody, they live at the standard of living of their mothers—which means that many experience poverty.<sup>17</sup> The major problem of divorce for women, particularly custodial mothers, "is not the lack of a male presence, but a lack of a male income."<sup>18</sup> Many believe that marital dissolution law plays a significant role in this, but few agree as to what that role currently is, or should be.<sup>19</sup>

## 2. Psychological Trauma

For children, divorce is undeniably stressful.<sup>20</sup> Above all, divorce frequently

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*Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (agreeing with Weitzman's overall findings that women suffer a post-divorce decrease in standard of living, but arguing that Weitzman's 73% figure was too high; the actual figure is closer to a 30% decline in the first year after divorce). Others found even smaller declines, and ultimately Weitzman herself acknowledged that her figures were erroneous. *See Women's Post-Divorce Study is All Wrong, Expert Says*, FLA. TODAY, May 17, 1996, at 8A; *see also* Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130, 135 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (asserting that Weitzman's emphasis on exceptional cases where there was significant property to divide distorted her figures).

<sup>16</sup> *See* DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 23 (1995).

<sup>17</sup> *See id.* at 24. Approximately 85% to 90% of divorced mothers have custody of their children. Child support awards tend to be inadequate to meet the costs of raising children, and enforcement has been historically weak. *See id.* at 27.

<sup>18</sup> GUTTMANN, *supra* note 13, at 100.

<sup>19</sup> Compare H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986) (finding that women divorced in no-fault states in 1979 received smaller alimony and child support awards than those divorced in fault divorce states in the same time frame) with Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95 (1989) (arguing that reductions in child support, alimony, and property distribution awards to women could be the result of other statutory changes that accompanied the shift to no-fault divorce, rather than resulting from the no-fault provisions themselves) and Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, (1989) (arguing that divorced women were not economically better off under a fault-based divorce law). *See generally* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 205-06 (1992) (asserting that the negative economic effects associated with divorce are not inevitable, and could be alleviated through enactment of more equitable exit rules for property identification and division, support, and parenting).

<sup>20</sup> *See* SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN 88 (1991) (describing severe emotional and educational problems triggered by

entails the permanent total or partial separation of children from one parent.<sup>21</sup> Although it can be difficult to separate the impact of factors such as marital disharmony and the lack of economic resources which accompany divorce from the trauma caused by the family breakup itself, most researchers have concluded that the impact of divorce on children is due primarily to the breakdown in family relationships: Parenting can be impaired by marital disharmony and parent-child relationships may be damaged indirectly by the parental conflict.<sup>22</sup>

Divorced adults, too, experience psychological trauma. Divorced women tend to suffer emotional trauma, including feelings of anger, depression, despair, loneliness, low self-esteem, grief, guilt, and anxiety.<sup>23</sup> Nevertheless, a significant number of divorced women report improved psychological well-being, self-esteem, and feelings of competency following divorce; many women experience marriage as more restrictive than men, and therefore have less to lose than men emotionally in divorce.<sup>24</sup> Divorced men seem to be at even greater risk of psychological trauma than women: Divorced men are nine times more likely than men from intact families to be admitted to psychiatric hospitals for the first

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marital disruption and divorce, and, in particular, by father absence).

The degree to which children suffer long-term negative effects from divorce remains controversial. Psychologists Judith Wallerstein and Sandra Blakeslee published a 1989 study finding that almost half the children of divorced parents experience long-term anxieties and insecurities that make it difficult for them to be successful in love and work relationships. *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 299–300, 314 (1989); *see generally* CLAIRE BERMAN, *ADULT CHILDREN OF DIVORCE SPEAK OUT: ABOUT GROWING UP WITH—AND MOVING BEYOND—PARENTAL DIVORCE* (1991). Several studies have found that children of divorced parents are more likely to suffer marital breakdown and divorce in their own marriages than children of intact families, in part because of a tendency towards early marriage among girls from separated or divorced families and the concomitant higher risk of divorce associated with early marriage and lower income families. *See* GUTTMANN, *supra* note 13, at 17, 196–97.

<sup>21</sup> *See* GUTTMANN, *supra* note 13, at 157–58.

<sup>22</sup> *See* GUTTMANN, *supra* note 13, at 200–01. Additional explanations for the negative impact of divorce on children include the inadequate socialization to appropriate role models that occurs in single-parent families, the economic hardship that is often associated with divorce, and its accompanying disruptions in living arrangements, schooling, and other activities. *See id.* at 200.

<sup>23</sup> *See id.* at 98–99.

<sup>24</sup> *See* KURZ, *supra* note 16, at 186. *See generally* CATHERINE KOHLER REISSMAN, *DIVORCE TALK: MEN AND WOMEN MAKE SENSE OF PERSONAL RELATIONSHIPS* (1990). One-third of the women in Kurz's sample questioned whether the institution of marriage was good for them, expressing doubts about whether equality and independence were possible in marriage. *See* KURZ, *supra* note 16, at 222.

time, while the rate for divorced women is only three times more than that of women from intact families.<sup>25</sup>

### 3. *Tears in the Social Fabric*

Finally, a rising divorce rate threatens the social order. Americans have historically feared divorce because it suggested a lapse from virtue.<sup>26</sup> Since virtuous families were seen as the foundation for a moral society—"the foundation of national morality must be laid in private families"—"a rising divorce rate was reason for great anxiety by politicians."<sup>27</sup> Whitehead writes that "[e]ven modest levels of divorce aroused fears of a spread of promiscuous behavior . . . ."<sup>28</sup> Demie Kurz explains that the nuclear family has been considered essential in order "to hold society together, to curb people's anti-social impulses, and to properly socialize the next generation," and because "without it there would be social disorganization, even anarchy."<sup>29</sup> The prospect of single-parent families appears particularly alarming.<sup>30</sup> In short, by undermining family and social bonds, which historically served as a lifelong support system for children who grew up in two-parent married households, divorce removed a basic form of social insurance.<sup>31</sup>

### B. *The Reasons for the High Divorce Rate*

Despite the significant likelihood that their marriages will end in divorce (currently fifty percent),<sup>32</sup> Americans do not seem to have given up on marriage. The marriage rate in the U.S. remains very high: Ninety percent of men and women in the U.S. marry during their lifetimes,<sup>33</sup> and ninety-six percent say that

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<sup>25</sup> See GUTTMANN, *supra* note 14, at 120.

<sup>26</sup> See WHITEHEAD, *supra* note 8, at 16.

<sup>27</sup> *Id.* (quoting John Adams).

<sup>28</sup> *Id.* at 18.

<sup>29</sup> KURZ, *supra* note 16, at 232.

<sup>30</sup> See *id.*

<sup>31</sup> See WHITEHEAD, *supra* note 8, at 8–9, 139. Relying on statistics that show that the median income of two-parent families is higher than that of single parent families, Whitehead observes that marriage is a vital economic resource in middle and working class families—more significant than a college degree. See *id.* at 8.

<sup>32</sup> See Margaret Talbot, *Love, American Style*, NEW REPUBLIC, Apr. 14, 1997, at 30, 32. Forty percent of first marriages and sixty percent of remarriages end in divorce. See Galston, *supra* note 8, at 14.

<sup>33</sup> See Talbot, *supra* note 32, at 30.



they want to marry at some point.<sup>34</sup> Seventy-five percent of Americans believe that “marriage is a lifelong commitment to be ended only under extreme circumstances.”<sup>35</sup> Why do so many continue to aspire to what is apparently an unlikely goal?

Two stories explaining the demise of permanence norms in marriage have emerged, and each has been influential in shaping legal reforms. Liberal commentators believe that the paradox is traceable to American optimism and high expectations for marriage: The ideal of marriage, with its trappings of romanticism, goal of permanence, and multiple purposes—romantic love, sex, economic partnership, parenting—is the cause of divorce.<sup>36</sup> In this view, divorce supports the institution of marriage, preserving the ideal of the romantic marital union and permitting those who have failed to reach it in one marriage to try again in another.<sup>37</sup> Proponents of this view defend no-fault divorce, and proffer proposals directed at reforming the economic consequences of divorce to protect investment, expectation, and reliance interests of the partners.

Conservative commentators, on the other hand, see rising divorce rates as a byproduct of individualism and a weak commitment to marriage and family; when individual interest diverges from the common good of the family unit, divorce becomes attractive.<sup>38</sup> The cycle is self-perpetuating: Divorce begets divorce and more female-headed families, because children of divorced parents have more difficulty forming permanent relationships and are more vulnerable to disruption in their future families and more likely to divorce or have children outside marriage.<sup>39</sup> In this explanation, women’s increased participation in the labor market is identified as a significant factor contributing to the rise of individualism and the concomitant decreased commitment to marriage and the two-parent family.<sup>40</sup> Proponents of this view argue for legal reforms which would make obtaining a divorce difficult, time-consuming, and costly, hoping to deter divorce altogether.

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<sup>34</sup> See *id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Talbot, *supra* note 32, at 30. This explanation is buttressed by the fact that even prior to the advent of no-fault divorce law, the United States had the “highest rate of divorce of any nation of parallel culture and development in the world.” Charles W. Tenney, Jr., *Divorce Without Fault: The Next Step, A Model for Change*, 46 NEB. L. REV. 24, 34 (1967).

<sup>37</sup> See J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 10 (1997).

<sup>38</sup> See KURZ, *supra* note 16, at 14 (summarizing the arguments of conservative commentators).

<sup>39</sup> See WHITEHEAD, *supra* note 8, at 11; see generally discussion, *supra* note 20.

<sup>40</sup> See WHITEHEAD, *supra* note 8, at 11.

### 1. *The Liberal Story of Marriage and Divorce*

In the liberal story, the ideal marriage is a companionate marriage defined in emotional terms and characterized by romantic love, compatibility, freedom of choice, and equality between husband and wife.<sup>41</sup> Ideals of affection and companionship depend upon and further an ideology of equality between men and women.<sup>42</sup> Romantic-companionate marriages are inherently more unstable than marriages forged out of duty, a desire to consolidate wealth, or a need to form a political alliance between dynasties—all historical reasons for marriage.<sup>43</sup> Thus, divorce in the U.S. preserves the opportunity to forge new, more harmonious marriages, and functions as “an expression of idealism about marriage, not a concession of realism about it.”<sup>44</sup>

In the liberal understanding of marriage, then, divorce is an individual right and a psychological resource, an opportunity for growth and change—a chance to remake oneself and to acquire new competencies.<sup>45</sup> Children’s psychological well-being is presumed to rise and fall derivatively with marital happiness, so that divorce is actually seen as desirable for children whose parents are incompatible, offering the opportunity for a new, more peaceful existence with one parent or the chance for a remarriage and a more harmonious family situation.<sup>46</sup> In short, divorce is viewed as strengthening the institution of marriage rather than eroding it.<sup>47</sup>

No-fault divorce laws are consistent with this vision of marriage. The ethic of individual entitlement to divorce suggested the removal of social, legal, and moral impediments to divorce, and its dominance in legal thought influenced the shift to no-fault divorce laws.<sup>48</sup> Marriage became “a voluntary (and therefore,

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<sup>41</sup> See REISSMAN, *supra* note 24, at 67.

<sup>42</sup> See *id.*

<sup>43</sup> See Talbot, *supra* note 32, at 32.

<sup>44</sup> *Id.* at 33. Talbot traces the roots of the concept of the right to divorce to the American Revolution, explaining that the practice of divorce was justified by reference to the Declaration of Independence and its proclamation of every individual’s right to pursue happiness and liberty. See *id.* at 32. The Supreme Court’s recognition of the right to divorce and the right to marry as fundamental liberties protected by the Constitution reflects this same vision of marriage and understanding of its central place in American history. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>45</sup> See WHITEHEAD, *supra* note 8, at 5.

<sup>46</sup> See *id.* at 6.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* While divorce had been permitted by law since the passage of the Married Women’s Property Acts in the 1840s, the government originally attempted to discourage divorce through the vehicle of restrictive fault-based divorce laws. The restrictions imposed by

perhaps, temporary) union of equals which either may terminate 'at-will' if it does not satisfy their desires and needs."<sup>49</sup> The shift to no-fault divorce "both

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such laws varied from state to state, but in general divorce was available only if one party proved that the other was at fault—guilty of adultery, desertion, or cruelty. If the wife was the "innocent" spouse in such an analysis, she was theoretically entitled to financial protection for life (or until she remarried) under most state alimony laws. If she was guilty of a marital sin, however, she could be denied alimony, and, frequently, property division and child custody. See KURZ, *supra* note 16, at 25.

No-fault divorce originated in this country in California, which adopted no-fault divorce laws in 1970; other states followed. See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 292 (1987). Some form of no-fault divorce has been available in all fifty states since 1985. See Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 661 (1994). No-fault divorce laws require, at most, a showing of irretrievable breakdown of the marriage, incompatibility, or irreconcilable differences, and typically permit a divorce by one party over the other's objection and without proof of fault (although waiting periods prior to finalizing the divorce may vary depending on whether both spouses consent). See KURZ, *supra* note 16, at 26.

No-fault divorce in turn inspired changes in rules governing alimony and marital property division at divorce. When it became apparent that no-fault divorce law removed a bargaining chip (consent to divorce) upon which wives had depended to protect their financial security when their husbands sought a divorce, a substitute form of insuring their economic security was necessary. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 32–33 (1991). Equitable distribution laws, consistent with the vision of marriage as an economic and emotional partnership, were adopted in most jurisdictions shortly thereafter. See *id.* at 33. Equitable distribution allowed considerations of equity, economic need, and contribution of the marital partners to the acquisition of marital assets to influence division of property, and minimized continuing economic dependence of one spouse upon another. See GUTTMANN, *supra* note 13, at 7–9. Permanent alimony was replaced by spousal support awards of short duration, designed to allow the economically dependent spouse to rehabilitate herself and become capable of independent support. See KURZ, *supra* note 16, at 26.

Nevertheless, a significant number of states continue to consider marital fault in dividing marital property or awarding alimony. See Adriaen M. Morse, Jr., Note, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 638 (1996) (noting that twenty-four jurisdictions consider marital fault in awarding alimony). Twelve states maintain heart balm statutes, which permit tort-based recoveries in the marital context. North Carolina, one of nine states that continues to recognize the torts of alienation of affections and criminal conversation, recently made legal headlines when, in the case of *Hutelmeyer v. Cox*, a jury found in favor of a jilted wife who had sued another woman for stealing her husband, awarding the now ex-wife \$1 million. See Terry Carter, *'She Done Me Wrong'*, A.B.A. J., Oct. 1997, at 24, 24; Cindi Andrews, *Love's Legal Loss*, GREENSBORO NEWS & RECORD, Aug. 16, 1997, at A1. See generally Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163 (1998) (discussing tort remedies predicated on marital fault).

<sup>49</sup> Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for*

reflected and contributed to the new conception of divorce.”<sup>50</sup> While most agree that no-fault laws did not cause the rise in divorce rates,<sup>51</sup> the laws certainly solidified public tolerance of divorce.<sup>52</sup>

Although not a feminist-inspired reform, no-fault divorce was initially heralded by most feminists as promoting gender equality, enhancing women’s autonomy and making it easier for women to leave unhappy or abusive marriages.<sup>53</sup> The vision of the spouses as equal economic partners in the

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*Distribution of Property at Divorce*, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 265, 266 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

<sup>50</sup> WHITEHEAD, *supra* note 8, at 68; *see also* MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 258 (1972) (explaining the legal shift to no-fault as a triumph of liberalism and a conscious effort to lower the legal barriers to divorce); RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 531, 561, 569, 615, 636 (1988) (characterizing the shift to no-fault divorce at law as part of a “general trend of liberalization” in American culture). Others disagree. *See* DIFONZO, *supra* note 37, at 2, 167–68 (asserting that the no-fault regime was part of a conservative effort to reverse or slow the divorce rate by channeling troubled marriages into therapeutic family courts); *accord* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 65–80 (1987); *see also* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 13, 54, 74, 166 (1988) (asserting that no-fault legal reformers successfully cast their efforts as routine legislation aimed at streamlining the legal process, adopting a conservative guise and pro-family vocabulary on moral issues).

Regardless of the original intent of divorce reformers in the no-fault era, however, the undeniable impact of no-fault was to create a system of divorce on demand, eliminating any requirement that spouses negotiate in the shadow of the law for release from the bonds of matrimony. Where the fault-based law had commonly required *de facto* mutual consent of parties seeking divorce (the innocent spouse had to agree to sue the guilty spouse for divorce, and the guilty spouse forewent legal defenses to divorce such as recrimination and condonation), the no-fault laws allowed unilateral divorce. *See* DIFONZO, *supra* note 37, at 170.

<sup>51</sup> Cherlin demonstrated that the dramatic increase in the divorce rates began in the early 1960s, prior to the liberalization of divorce law in the 1970s. *See generally* ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE (1981). Thus, the laws appear to be responsive to a growing demand for divorce rather than the cause of it. Nevertheless, the debate rages on, fueled most recently by new evidence that suggests that law played some causal role in at least the rise in divorce which occurred between 1970 and 1975. *See* Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1450–53 (1998).

<sup>52</sup> *See* Arland Thornton, *Changing Attitudes Toward Separation and Divorce: Causes and Consequences*, 90 AM. J. SOC. 856, 869 (1985); Gerald C. Wright, Jr. & Dorothy M. Stetson, *The Impact of No-Fault Divorce Law Reform on Divorce in American States*, 40 J. MARRIAGE & FAM. 575, 580 (1978); *see also* GOODE, *supra* note 12, at 322 (observing that both the rise in divorce rates and the change in laws originate from the same sources: shifting cultural norms and values, changing economic opportunities, and images presented by the media).

<sup>53</sup> *See* DIFONZO, *supra* note 37, at 173. The no-fault laws were adopted with literally no

marriage powerfully influences the law of marital dissolution, dictating presumptions of equal division of assets and liabilities upon divorce.<sup>54</sup> This idea of marriage as a partnership and the application of equality standards to marital dissolution law is also consistent with the goal of reducing sex role stereotyping in marriage and valuing women's unpaid domestic caregiving work as a contribution at least theoretically equal to men's wage earning work.<sup>55</sup> However, no-fault impacted women's post-divorce economic status in dramatic and unforeseen ways. The confluence of women's role as post-divorce custodial parent, labor market disadvantage stemming from discrimination, conflicts of caretaking obligations with employer's expectations and historical investment in husband and children rather than in their own marketability produced a markedly lower standard of living for women post-divorce.<sup>56</sup> Changes in laws governing alimony and property division to make them more responsive to goals of promoting autonomy and financial independence contributed to the situation.<sup>57</sup>

## 2. *The Conservative Story: Marriage as Duty*

The conservative understanding of marriage is based on duties forged from moral and religious beliefs and by economic dependency rather than on a relation predicated on romantic love.<sup>58</sup> While persons are free to pursue their individual interests in the market, the family is associated with duty, self-sacrifice and commitment.<sup>59</sup>

The cultural norm of marital permanence historically attempted to ensure a stable and strong family support network for children, while at the same time preserving the ideal of affective marriage—marriage based upon voluntary

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input from or effort on behalf of organized women's groups, but were politically packaged in terms that would appeal to women active in the then-burgeoning feminist movement. See JACOB, *supra* note 50, at 3, 23.

<sup>54</sup> See DIFONZO, *supra* note 37, at 173.

<sup>55</sup> See *id.* at 276.

<sup>56</sup> See DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE AND EMPLOYMENT AMONG AMERICAN WOMEN 31 (1996) (finding that women suffer on average a 24% decline in family income after divorce while men suffer only a 6% decline); see *supra* notes 15–19 and accompanying text.

<sup>57</sup> It is debatable whether no-fault divorce laws themselves actually worsened women's legal positions. Mechanisms to enforce the old fault-based awards were lacking, and most women never received alimony from their ex-husbands even when it was ordered. See KURZ, *supra* note 16, at 25; see also Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 437 (1988) (noting that historically the payment of alimony was even rarer than the award of alimony).

<sup>58</sup> See Talbot, *supra* note 32, at 36.

<sup>59</sup> See *id.*

affections rather than economic necessity or parentally arranged contracts:

Marital permanence preserved freedom of individual choice in the selection of a marriage partner but required that this free choice could be exercised only once. Under these cultural terms, one-time choice turned into a lifelong commitment, with a clear set of binding duties and obligations between the spouses as well as between the married parents and their children.

The norm of permanence helped stabilize the shaky foundation of marriages based on affective individualism. It also created the cultural condition for generous and long-term investments in the marriage. An assumption of permanence encouraged spouses to invest in the relationship, without fear that such emotional and material investments could be lost with the dissolution of the marriage.<sup>60</sup>

Children were perceived as “stakeholders in their parents’ marriage” and parents were exhorted to “‘stay[ ] together’ for the sake of the children.”<sup>61</sup>

The marital permanence norm proved insufficient to stabilize marriage in a society otherwise committed to liberal notions of freedom of choice. Women who entered the labor market hastened the family’s demise by bringing market values home with them at night. Family life became simply another domain for the pursuit of individual happiness and self-interest, and the “divorce culture” took root.<sup>62</sup> As market values invaded the family realm, divorce became a form of “psychological entrepreneurialism,” an avenue toward self-expression, growth and transformation, particularly for women.<sup>63</sup>

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<sup>60</sup> WHITEHEAD, *supra* note 8, at 140.

<sup>61</sup> *Id.* at 142. The assumption was that marital stability and child well-being were linked.

<sup>62</sup> *See id.* at 5. Others agree. *See* GUTTMANN, *supra* note 13, at 22 (theorizing that as cultural values shifted toward immediate gratification, adaptability, mobility and replacement rather than commitment, perseverance and long-term investment, they have tended to produce a higher divorce rate); *see also* GUSTAV MARIUS BRUCE, *MARRIAGE AND DIVORCE: A SOCIOLOGICAL AND THEOLOGICAL STUDY* 127 (1930) (blaming the “philosophy of individualism and selfishness” for the rise in the divorce rate in the early 1900s). Communitarians have dubbed the increasing emphasis on self-fulfillment that emanated from the 1960s and the concomitant emphasis on romantic love, hedonism and self-fulfillment in marriage “expressive individualism.” *See* ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 333–34 (1985).

Social scientists have sought to explain the phenomenon in more value-neutral behavioral terms: People are simply operating in their own self-interest, just as they always have; what has changed is the market. In the past, people (especially women) made investments in family relationships because their best opportunities for advancement lay there. As families have become more fragile and a more attractive structure of opportunities has developed outside the family, people have tended to invest in themselves and to pursue self-advancement outside the family because it is likely to be more profitable in the long run. *See* GOODE, *supra* note 12, at 9.

<sup>63</sup> *See* WHITEHEAD, *supra* note 8, at 56. Whitehead dubs this the ideology of “expressive

Women and capitalism are blamed for the new divorce culture. Women who compete with men for money in the market do not fit the ideal of the virtuous, pure, and moral voice in the family.<sup>64</sup> Wives' employment threatens the traditional authority of husbands and frees women to leave unhappy marriages.<sup>65</sup> In the conservative story, then, divorce is closely associated with capitalism, consumption, and the expression of women's initiative and independence.<sup>66</sup>

Conservatives originally supported the ideology of "expressive divorce" since it was compatible with a deregulated environment and the celebration of market forces, values, and reasoning.<sup>67</sup> As the costs to children became clear, however, conservatives abandoned expressive divorce as selfish.<sup>68</sup> In a post-

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divorce," and her analysis of its parallels to the American marketplace is illuminating:

[E]xpressive divorce saw one's inner resources as a block of capital, to be developed and deployed to maximum advantage. The deeper logic of expressive divorce was the logic of capitalism. Just as the ideology of the market called upon the owner of capital to maximize resources, so the expressive ideology of divorce urged the proprietor of psychological capital to do the same. . . . In order to maximize profits, capital had to be mobile; like financial capital, psychological capital should not be fettered or bound by relationships that did not yield high returns.

The logic of expressive divorce also suggested that relationships themselves—especially relationships that are binding or permanent—are risky investments. The most reliable form of investment thus becomes the investment in the self. The logic of expressive divorce argued not only for building one's own psychological capital, therefore, but also for keeping it liquid. A self not tied down by permanent bonds and obligations was a self that could take advantage of new opportunities as they came along.

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Marketplace values of choice, unfettered freedom, contingency, and dynamic change were the values of expressive divorce.

*Id.* at 76–77.

<sup>64</sup> *See id.* at 53.

<sup>65</sup> *See id.* at 21–23.

<sup>66</sup> *See id.* at 53–54. Christopher Lasch makes a similar point, arguing that capitalism and material prosperity inevitably wore away the moral foundations of family life: "Instead of serving as a counterweight to the market, . . . the family was invaded and undermined by the market." CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 96 (1995).

<sup>67</sup> *See* WHITEHEAD, *supra* note 8, at 79.

<sup>68</sup> Whitehead observes that expressive divorce split loyalties in the liberal community because it highlighted the "fault line" between women and children: Women's pursuit of marketplace opportunities and independence from men placed children at risk. *See id.* at 79–80. Again, Christopher Lasch agrees: Women were forced into the market in order to obtain equality with men in a system which devalued women's traditional unpaid caretaking work and accepted money as the universal measure of value, and children paid the price. *See* LASCH, *supra* note 66, at 96.

agrarian market, where children do not provide a financial return on parental investment of time and money, children's dependence necessitates altruistic behavior such as sacrifice or deferral of parental interests.<sup>69</sup> The values privileged in the postindustrial market—value for value exchanges, timely return on investments of resources, and individualism—are inappropriate to the family sphere, and particularly to raising children.

Rather than challenging the definition of work, workplace norms, or postindustrial market values, conservatives argue that the model of family relationships should reject the model of relationships offered by the market, so that the family exists in opposition to the market as a source of competing values.<sup>70</sup> While some conservatives reject the notion that it will be necessary to return to a "separate spheres" ideology in which men and women are assigned gendered roles in the market/family spheres, with men assuming the role of breadwinner and women assuming the role of homemaker, nurturer, and caretaker, others embrace the idea.<sup>71</sup>

### *C. Family Law Reform*

#### *1. Liberal Reform Proposals*

Liberal reform proposals accept the necessity of divorce in a society committed to companionate marriage and equality norms, and argue for reforms

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<sup>69</sup> See WHITEHEAD, *supra* note 8, at 153–54.

<sup>70</sup> See *id.* at 194. Whitehead explains that "precisely because other social bonds are becoming more undependable and impermanent, the need for strong and lasting family bonds increases . . . . This means that there must be a sustained effort to strengthen marriage bonds and to create a social and cultural environment supportive of the commitment to marriage." *Id.* at 192.

<sup>71</sup> Compare WHITEHEAD, *supra* note 8, at 133 (defending the nuclear family's ability to adapt to change, and arguing that marriage need not inevitably be associated with the separate spheres ideology of Ozzie and Harriet days) with BLANKENHORN, *supra* note 8, at 65–95 (arguing for a return to traditional gendered roles of father-as-breadwinner and mother-as-caretaker).

Others suggest that we are already moving in the direction of a return to the traditional "one paycheck family," as women in increasing numbers leave the paid workforce to bear or raise young children. See, e.g., Starnes, *supra* note 6, at 289 (arguing that the full-time homemaker/primary breadwinner model is not extinct, and may even be making a comeback); see also Maggie Mahar, *A Change of Place*, BARRON'S, Mar. 21, 1994, at 121 (asserting that the growth of labor market participation by women appears to be slowing). Finally, some argue persuasively that the traditional nuclear family is "an ahistorical amalgam of structures, values and behaviors that never coexisted in the same time and place"; the Cleavers and the Walton had fundamentally different family structures; domesticity was never an option for slave women or working-class women. See COONTZ, *supra* note 19, at 8–11.



of marital property distribution law and alimony law to more equitably compensate homemakers for their labor and their investment in caretaking work.<sup>72</sup> While liberals are correct that divorce must be freely available if marriage is to be a relation of equality rather than dependency, liberal solutions rarely go far enough in recognizing that the interaction of the waged labor market and the cultural division of household work along gender lines produces a de facto dependent status for caretakers—who are typically women.

Martha Fineman has persuasively argued that adherence to the ideal of the egalitarian marriage, preference for the gender-neutral equality model in the family law context and reluctance to advocate result-oriented affirmative action principles significantly disadvantage women at divorce.<sup>73</sup> The partnership ideal of marriage presumes that “marriage is a partnership among equals who share work and family responsibilities equitably and who have equal opportunities to structure their private lives, as well as to choose from an equal range of options in the wage workforce.”<sup>74</sup> Equality ideals translated in marital dissolution laws—equal sharing of assets and liabilities at divorce—fly in the face of the reality that most wives assume more than a partner’s share of the household labor and child caretaking work, both during marriage and after divorce (since most women retain primary custody of children after divorce).<sup>75</sup>

Similarly, the cultural assignment to women of the primary responsibility for nurturing children and making a home undermines their performance in the market. The prevailing assumption that “employers are entitled to workers with limited caregiving responsibilities” ensures that few women will be capable of functioning as “ideal workers.”<sup>76</sup> Women who are not caregivers may be adversely affected as well, because employers will assume that their attachment to the waged labor market is secondary.<sup>77</sup> Thus, couples have economic

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<sup>72</sup> See, e.g., Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 139 (1993) (arguing that primary caretakers should be compensated at divorce through alimony awards); Jane Biondi, Note, *Who Pays for Guilt: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611 (1999) (arguing that economic reforms of marital property law that promote equal financial outcomes for men and women after divorce are preferable to fault-based reforms that cloak women’s economic disadvantage in moral rhetoric and privatize dependence).

<sup>73</sup> See FINEMAN, *supra* note 48, at 23–26.

<sup>74</sup> NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 61 (1997).

<sup>75</sup> See FINEMAN, *supra* note 48, at 29.

<sup>76</sup> See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1, 20 (2000).

<sup>77</sup> See ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 87 (1992); see also, e.g., cases cited *infra* note 186 (reflecting market hostility toward working mothers).

incentives as well as cultural incentives to accord primacy to the husbands' careers when the demands of family and work press upon the marriage. While there are ways to reform family law to protect women's human capital investment in their husbands' careers and their children's upbringing without entrenching the gendered division of labor, many risk reifying the gendered division of caretaking work.<sup>78</sup>

Most importantly, though, the classic double bind of simultaneous commitment to the ideology of a breadwinner/homemaker norm and companionate-romantic marriage in a society committed to sex equality leads liberals to attribute marital breakdown to the failures of individual marital partners to live up to the ideal of marriage, rather than questioning the institution itself or the market context in which it must function.<sup>79</sup> Even if spouses were adequately compensated for caretaking at divorce, the liberal solution does nothing to reduce marital tension or the likelihood of divorce. Until we look critically at the norms surrounding the breadwinner/homemaker ideal we are destined to repeat and reproduce in marriage the sources of gender inequality and marital discord.<sup>80</sup>

## 2. Conservative Reform Proposals

The conservative divorce reform proposals reflect an understanding of divorce as an expression of individualistic, self-promoting behavior. The

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<sup>78</sup> For a sampling of feminist proposals along these lines, see June Carbone, *Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1493-95 (1990) (proposing a restitutionary system that would encourage women to work in the waged labor market while also continuing to bear the primary responsibility for childrearing and to engage in spousal sharing behavior in support of their husbands' careers); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2455 (1994) (arguing that an income-sharing approach would also encourage husbands to increase their investment in family caretaking duties); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2257-66 (1994) (arguing for income equalization after divorce, during the time there exist dependent children, in order to protect spousal investments made during marriage in the other spouse's income-earning potential).

<sup>79</sup> See REISSMAN, *supra* note 24, at 72.

<sup>80</sup> See *id.* at 72-73. According to Pepper Schwartz, "[t]he linchpin of marital inequality is . . . the provider complex, a combination of roles that give the man the responsibility for financially supporting the family's life-style and the woman all the auxiliary duties that allow the man to devote himself to his work." PEPPER SCHWARTZ, *PEER MARRIAGE: HOW LOVE BETWEEN EQUALS REALLY WORKS* 111 (1994). In a world where marital permanence was the reality, the provider complex would be more functional, but in a world characterized by divorce and a commitment to gender equality, "resentments [associated with] the provider complex . . . simply serve to undermine the harmony of the household." *Id.* at 118.

conservative policy fix for both divorce and resulting poverty is to deter divorce through the imposition of a marital permanence norm with the force of law. Conservative and communitarian critics argue that family law should function as a moral yardstick to enforce communal values, setting a standard that encourages loyalty to commitments made in marriage vows and discourages, even punishes, those who seek to renege on them.<sup>81</sup> The argument is simply "[w]here there is fault, there should be consequence."<sup>82</sup>

Academics and legislators have responded to this call with proposals to reform no-fault divorce law, seeking to erect barriers to obtaining a divorce and to send a moral message about responsibility and duty by making divorce more costly for those at fault.<sup>83</sup> Proponents of such reforms include an unlikely alliance of men's rights groups (who favor fewer custody battles because they tend to be resolved in women's favor in the courts),<sup>84</sup> some feminists (who believe that current law favors men financially and assists them in obtaining quick exits from marriage),<sup>85</sup> right-wing Christian groups, communitarians, and

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<sup>81</sup> See Galston, *supra* note 8, at 22 (describing argument and advocating a five-year waiting period for nonconsensual, no-fault divorce). While Whitehead stops short of recommending changes in divorce laws, see WHITEHEAD, *supra* note 8, at 192, others have relied upon her arguments to make the case for legal reforms. See, e.g., GALLAGHER, *supra* note 8, at 218, 249–50 (advocating abolishing unilateral divorce; imposing a five- to seven-year waiting period for contested no-fault divorces in order to give the partner who does not desire divorce more bargaining power; making the marriage contract more explicit by giving couples a copy of the marriage contract adopted in their state; requiring state courts to recognize the validity of other states' marriage contracts and to use them as the basis for divorce; and affording couples the option of making a permanent marriage contract via a prenuptial covenant prohibiting divorce altogether or allowing it only for serious cause).

<sup>82</sup> See Morse, *supra* note 48, at 642. See generally Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (exploring and analyzing concerns expressed by academic, political, and philosophical writers about the decline of morality in family law).

<sup>83</sup> It is important to distinguish between proposals to reinject fault into divorce proceedings so as to block unilateral divorce, and proposals to reinject fault into the financial consequences of a no-fault divorce. While both are grounded in a moral approach, the former blocks divorce completely while the latter simply makes it more expensive.

<sup>84</sup> See Laura Gatland, *Putting the Blame on No-Fault*, A.B.A. J., Apr. 1997, at 50, 52 (quoting Jeffery Leving, a leading men's rights advocate and president of the National Institute for Fathers and Families in Chicago).

<sup>85</sup> See *id.* at 52 (quoting Betty Friedan); Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2530 (1994) (arguing for the reintroduction of a fault discourse into divorce law narrative to compensate women); see also Sugarman, *supra* note 15, at 136–38 (suggesting ways to reintroduce concepts of culpability into divorce through the use of tort law).

liberal political philosophers (who seek to combat the societal ethos of individualism).<sup>86</sup>

The most direct way to deter divorce would be to repeal no-fault divorce laws and substitute laws that block unilateral divorce.<sup>87</sup> Such proposals are politically unpalatable in most states. An ever-increasing number of states are, however, considering legislative reforms that would make it more difficult or expensive to divorce and hopefully provide an incentive for couples to stay together. These bills would legitimize premarital agreements to seek a divorce only on certain grounds,<sup>88</sup> or impose procedural barriers such as predivorce counseling or waiting periods.<sup>89</sup>

Since 1995, almost half the states have considered some form of legislation designed to deter divorce.<sup>90</sup> Connecticut, Iowa, and Utah have adopted moderate legislation designed to stem the flow of divorce, instituting mandatory premarital

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<sup>86</sup> See Gatland, *supra* note 84, at 51 (quoting William Galston, former advisor to President Clinton and presently the Director of the Institute for Philosophy and Public Policy at the University of Maryland).

<sup>87</sup> See Hanna Rosin, *Separation Anxiety: The Movement to Save Marriage*, NEW REPUBLIC, May 6, 1996 at 14, 14. Some jurisdictions have attempted this. See, e.g., H.B. 1983, 181st Gen. Court, Reg. Sess. (Mass. 1999), available in Westlaw, Bills Database, 1999 MA H.B. 1983 (SN) (prohibiting unilateral no-fault divorce); A.B. 807, 209th Leg., Reg. Sess. (N.J. 2000), available in Westlaw, Bills Database, 2000 NJ A.B. 807 (SN) (eliminating no-fault provision in divorce statute and preserving fault grounds).

<sup>88</sup> See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 43, 79–91 (1990) (advocating “precommitment” restrictions in antenuptial contracts limiting the conditions under which the marriage may be dissolved and conditioning the divorce decree on economic penalties). Scott’s concept of “covenant marriage” was introduced through bills in Illinois, Washington, and Indiana during 1995 and 1996, and was adopted by Louisiana in 1997. See DiFONZO, *supra* note 37, at 175; see *infra* notes 92–93 and accompanying text (discussing Louisiana law).

<sup>89</sup> See Gatland, *supra* note 84, at 52; see also H.B. 914, 20th Leg., Reg. Sess. (Haw. 1999), available in Westlaw, Bills Database, 1999 HI H.B. 914 (SN) (imposing waiting period after divorce filing for couples with minor children; requires pre-divorce counseling); DiFONZO, *supra* note 37, at 177; PARKMAN, *supra* note 77, at 7–8, 137–40. Still another approach is to make marriage more difficult by interposing barriers designed to encourage reflection. See, e.g., H.B. 4631, 89th Leg., Reg. Sess. (Mich. 1997), available in Westlaw, Bills-Old Database, 1997 MI H.B. 4631 (SN) (requiring premarital education program or longer waiting period prior to issuance of license).

<sup>90</sup> See Dana Milbank, *Blame Game: No-Fault Divorce Law Is Assailed in Michigan, and Debate Heats Up*, WALL ST. J., Jan. 5, 1996, at A1; Dirk Johnson, *Attacking No-Fault Notion, Conservatives Try to Put Blame Back in Divorce*, N.Y. TIMES, Feb. 12, 1996, at A8. An examination of the Westlaw Bills Database under the terms “family law,” “fault,” and “divorce” will reveal a variety of bills, including those just mentioned, designed to deter divorce.

or predivorce counseling and requiring participation in educational courses regarding the effects of divorce on children and family relationships.<sup>91</sup>

Louisiana has gone the furthest, adopting legislation that requires couples applying for marriage licenses to choose either the existing no-fault system permitting divorce upon a six-month separation, or "covenant marriage,"<sup>92</sup> an option that requires couples to undergo premarital counseling regarding the nature of their obligations to one another in marriage; marital counseling should problems arise; and that imposes a two-year waiting period prior to divorce (the existing no-fault regime features a six-month waiting period).<sup>93</sup> Exceptions are allowed (and immediate divorce made available) to those who establish that their spouses have committed adultery, abandonment for one year, domestic violence, child abuse, a felony leading to imprisonment, or continuous separation without reconciliation for two years, or one year from the date that a judgment of

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<sup>91</sup> See S.B. 2265, 76th Gen. Assembly, 2d Sess. (Iowa 1996), *available in* Lexis, States Library, IA (enacted); S.B. 116, 52d Leg., Reg. Sess. (Utah 1997), *available in* Westlaw, Bills Database (enacted); *see also* Roberta Kirwan, *Money Newslite*, 25 MONEY (July 1, 1996) at 26, *available in* 1996 WL 8793000.

<sup>92</sup> Couples must sign a declaration of intent for a covenant marriage when they submit their marriage license application, and attach a notarized affidavit signed by a clergy person or marriage counselor attesting to the fact that they have received premarital counseling. *See Outlook: A Look At Marriage and Divorce; What the Law Says*, WASH. POST, Aug. 10, 1997, at C3. The declaration must also include a recitation by the couple, as follows:

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.

LA. REV. STAT. ANN. § 9:224 *et seq.* (West 1999). *See generally* Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998) (analyzing and defending covenant marriage legislation); Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509 (1999) (critiquing covenant marriage legislation).

<sup>93</sup> *See* Covenant Marriage Act, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. § 9:224 to :309 (West 1999)); Stephen Chapman, Editorial; *Louisiana to Roll Back Divorce Revolution*, ORLANDO SENTINEL, July 21, 1997, at A11.

separation from bed and board is assigned.<sup>94</sup> Already-married couples may convert their unions to covenant marriages if they wish.

### 3. *Summary*

The fundamental differences in the way liberals and conservatives think about marriage thus shape their proposals for reform. Accepting divorce as a necessary byproduct of the quest for companionate marriages predicated on sexual equality, liberals focus on the aftermath of divorce—particularly its economic consequences for women and children. Conservatives, by contrast, see marital breakup itself as the problem to be rectified; preventing divorce necessarily avoids its consequences. Both place some of the blame on women's position in the labor market, yet neither proposes solutions that reach beyond the family law arena.

## III. EMPLOYED WOMEN AND DIVORCE

Liberals and conservatives share a common assumption that ultimately restricts their vision and circumscribes proposed reforms. That assumption is that home and market, family and work are separate spheres which embody different sets of values and can be maintained in opposition to one another. Thus, problems in one sphere are seen as unrelated to those in the other. Historically, the separation between home and market has been sustained through a rigid gendered division in which men are assigned characteristics associated with the market (among them ambition, authority, power, vigor, calculation, and logic) and women are assigned characteristics associated with the family (sensitivity, altruism, empathy, submissiveness, and cooperativeness). This yin and yang vision fosters mutual dependence between the sexes, with women dependent on men for economic support, and men dependent on women for emotional sustenance and care.<sup>95</sup> The state sanctions this dependence through marriage.<sup>96</sup>

As women have crossed the boundary between home and market, however,

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<sup>94</sup> See *id.* Subsequently, Arizona adopted a more moderate form of covenant marriage that allows divorce by mutual consent and expands the fault bases for divorce without consent. See ARIZ. REV. STAT. § 25-901–906 (1999). A number of other states have considered covenant marriage bills, and legislation is still under consideration in Georgia and West Virginia. See H.B. 1087, 145th Leg., Reg. Sess. (Ga. 1999); S.B. 191, 113th Leg., Reg. Sess. (Ga. 1999); H.B. 2208, 75th Leg., Reg. Sess. (W. Va. 2000).

<sup>95</sup> See COONTZ, *supra* note 19, at 58–59.

<sup>96</sup> See *id.* at 59; see also Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205 (1995) (describing the State's reliance on and furtherance of the family—sanctified by marriage—as the social institution that bears the burden of dependency in lieu of the State).

the line between the two has become increasingly blurred. The erosion of the dividing line between home and market brings with it shifts in gender roles that inevitably impact the institution of marriage. In particular, the traditional male breadwinner/female homemaker norm is fading under the pressure of market realities.

The divorce rate is undeniably correlated with women's participation in the waged labor market. Divorce rates are highest for couples where the wife is employed or has an independent income, and the probability of divorce increases as the wife's income increases—particularly if her income is high relative to her husband's.<sup>97</sup> In this Part, I explore various explanations for the impact of women's paid employment on marital stability, and make explicit the ways in which they fit together with the liberal and conservative visions of marriage and divorce.

### *A. The Demise of the Economic Foundations of Marriage*

One theory explaining the connection between women's labor market participation and the divorce rate is the common sense observation that unhappy marriages which might previously have survived are more easily dissoluble without the glue of economic necessity. As it becomes possible for women to support themselves economically, continuation of a marriage comes to depend on the quality of the relationship and on emotional gratification derived in it.<sup>98</sup>

#### *1. Reduced Specialization of Family Labor/Economic Incentives*

Building upon this observation, economists have theorized that women's ability to participate in the paid labor market creates an economic disincentive to invest in the marriage and may actually function as an incentive to divorce. Since the gains achieved by marrying and specializing in homemaking and caretaking have decreased relative to those now available to women in the labor market, more women will decrease their investment in these skills and roles and choose to enter the labor market instead.<sup>99</sup> Further, because people are less appreciative of the contributions made by their spouses when they are able to produce these commodities themselves, marriages in which one spouse does not specialize in either homemaking or breadwinning tasks are more fragile than those in which specialization occurs.<sup>100</sup> Thus, the shift away from the efficient bargain that a

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<sup>97</sup> See GUTTMANN, *supra* note 13, at 12.

<sup>98</sup> See CHERLIN, *supra* note 51, at 52–53; KURZ, *supra* note 16, at 17–18.

<sup>99</sup> See CHERLIN, *supra* note 51, at 99 (citing GARY S. BECKER, A TREATISE ON THE FAMILY (1991)).

<sup>100</sup> See PARKMAN, *supra* note 77, at 36.

gendered division of labor in the family represents and toward an inefficient bargain in which men and women share both breadwinning and homemaking obligations creates an incentive for divorce.<sup>101</sup>

The assumption that a gendered division of labor in the family is efficient has been challenged by many feminists, who have argued that economic analysis either fails to account for women's comparative disadvantage in the labor force, or simply assumes it inevitable; women's specialization as caregivers and homemakers is efficient in large part because women earn less than men do in the waged labor market and because waged labor is structured in such a fashion that it is incompatible with homemaking and caretaking obligations.<sup>102</sup> Further, economic analyses of the family tend to commodify it, creating a risk that reform proposals will promote market-like transactions within the family, which some regard as undesirable.<sup>103</sup>

Even if a gendered division of labor in the family is the most efficient strategy, it has consistently been linked with exploitation within the family and with gender inequality in American society.<sup>104</sup> Notwithstanding economists' assertions that "[e]fficient outcomes usually are fair" because they are predictable, and efficient rules "tend to promote equality" because they are neutral as to gender characteristics,<sup>105</sup> even economists admit that specialization has contributed to women's lower earnings.<sup>106</sup>

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<sup>101</sup> See *id.*

<sup>102</sup> See Marianne A. Ferber & Bonnie G. Birnbaum, *The New Home Economics: Retrospects and Prospects*, 4 J. CONSUMER RES. 19, 20-21 (1977); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 97 (1993); Singer, *supra* note 78, at 2440; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-23, 831 (1989).

<sup>103</sup> See Ann Lacquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 28-30 (1996). But see Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (defending economic discourse on the subject of law and housework, and arguing that economic understandings of household work can and should co-exist with emotional or noneconomic conceptions in feminist analyses).

<sup>104</sup> See Singer, *supra* note 78, at 2440-41.

<sup>105</sup> See PARKMAN, *supra* note 77, at 121.

<sup>106</sup> The demise of specialization and the availability of no-fault divorce have combined to reduce the gender wage gap:

[W]ith less security during marriage, married women have increased their labor force participation. With an increase in women's attachment to the labor force, the ratio of women's wages to those of men has increased. . . . With more attachment to the labor force, women have been willing to invest in the skills necessary to enter higher-paying fields such as management where on-the-job training is important.



## 2. No-Fault Law: Planning for Divorce

Economic theorists believe that no-fault divorce law plays a significant role in reducing specialization in household labor, and thus contributes to the higher incidence of divorce. By deterring divorce and creating enforceable expectations that marriage would be of long duration, the old fault-based law encouraged women's investment in homemaking and caretaking activities.<sup>107</sup> No-fault law, on the other hand, tends to discourage investment by women in homemaking and caretaking work and to encourage women to resist economic dependency. Thus, some commentators assert that no-fault divorce law itself caused happily married women to enter the labor market in order to protect themselves against the adverse financial consequences of unwanted divorces.<sup>108</sup>

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<sup>107</sup> See *id.* at 31, 32; see also Ira Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 40-44 (1989) (arguing that alimony awards provide a deferred return on the wife's early investments in her husband's earning capacity, her pivotal role in childbearing and rearing, and domestic services rendered which further her husband's career, none of which have significant general market value).

<sup>108</sup> See PARKMAN, *supra* note 77, at 96. According to these commentators, some women forego bearing children and disinvest in marriage and family because they fear divorce, favoring increased investment in career. Maggie Gallagher refers to this phenomenon as "defensive" careerism." GALLAGHER, *supra* note 8, at 183. Some suggest that no-fault divorce law is responsible for the decreased quality of life enjoyed by married women who now average more working hours (the total of their paid and unpaid labor) in anticipation of divorce than they did under the fault-based system. See PARKMAN, *supra* note 77, at 99-100; see also Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998) (reporting the results of an empirical study suggesting that the advent of no-fault divorce has increased the hours worked by married women). While Parkman acknowledges the impact on women's work hours of husbands' refusal to assume responsibilities for a larger percentage of domestic chores, he nevertheless believes that married women who pursue paid employment as a hedge against the economic effects of no-fault divorce rather than as a part of a family plan designed to maximize family resources cannot reasonably expect their husbands to pick up the slack. See PARKMAN, *supra* note 77, at 100. Parkman explains that since married women's paid employment is selfishly motivated (functioning as a form of "personal insurance against the potential costs of divorce") rather than dedicated toward altruistic goals such as family welfare, other family members are justified in their reluctance to assist with household work. See Parkman, *supra*, at 49.

Not surprisingly, these commentators argue for a return to fault-based divorce and for the preservation of alimony awards in order to reward investments by women in the homemaking-caretaking role. See Estin, *supra* note 107, at 13. See generally PARKMAN, *supra* note 77; Gary S. Becker, *Finding Fault With No-Fault Divorce*, BUS. WK., Dec. 7, 1992, at 22; Lloyd Cohen, *Marriage, Divorce and Quasi Rents*; or, "I Gave Him the Best Years of My Life," 16 J. LEGAL STUD. 267 (1987); Ann Lacquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 524-29 (1995) (discussing efficiency theories and their application to divorce policy).

Some researchers have found that wives who are unhappy in their marriages are more likely to undertake market work or increase the hours they work in the market in anticipation of divorce, which further strains their marriages.<sup>109</sup> Others theorize that employed wives who are dissatisfied with their marriages come into contact with more “spousal alternatives” than those who are not employed in the market, again contributing to marital instability and encouraging divorce.<sup>110</sup> Finally, once committed to the paid labor market, women may find that the benefits there outweigh those of marriage: Married women who enjoy high earning power and permanent commitment to the labor market are less likely to stay married than are homemakers.<sup>111</sup>

### 3. *The Declining Male Wage and the Female Competitor*

Ample evidence exists that the deteriorating income position of men contributes to divorce, causing both the increased employment of married women (necessary to supplement the family income) and marital conflict which in turn fuels divorce rates.<sup>112</sup> Some lay the blame for the phenomenon of the declining male wage squarely on the feminist movement, asserting that the stagnation of male wages is partly the result of women’s entry into the labor force and their tendency to undercut the male wage.<sup>113</sup>

### 4. *Economic Incentives Don’t Capture the Entire Picture*

Clearly, the decline-of-economic-necessity explanation for the rising divorce rate rests on the reality that marriage is shifting from a relation of economic dependence to a coequal breadwinner model. Nevertheless, cultural norms of

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<sup>109</sup> See CHERLIN, *supra* note 51, at 52–53. Arlie Hochschild agrees that work functions—particularly for women—as a backup system or insurance network for a destabilizing family. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 201 (1997). Women who prepare for divorce by working more hours outside the home are more likely to find their marriages ending in divorce. *See id.*

<sup>110</sup> See Scott J. South & Kim M. Lloyd, *Spousal Alternatives and Marital Dissolution*, 60 AM. SOC. REV. 21, 22 (Feb. 1995). In addition, of course, an increase in employed women also increases married men’s access to spousal alternatives and thus may provide men with an incentive to divorce. *See id.* at 32–33.

<sup>111</sup> See GALLAGHER, *supra* note 8, at 182.

<sup>112</sup> See CHERLIN, *supra* note 51, at 54 (citing RICHARD A. EASTERLIN, *BIRTH AND FORTUNE: THE IMPACT OF NUMBERS ON PERSONAL WELFARE* (1980)); *see also* GALLAGHER, *supra* note 9, at 192–93 (arguing that the decline in male wages is both the cause and a consequence of the rising divorce rate, because divorced men tend to earn less money than married men).

<sup>113</sup> See GALLAGHER, *supra* note 8, at 188, 191–92.

women as caretakers of children and women's disadvantaged position in the labor market ensure that many women are still de facto economically dependent on men. Furthermore, even if the marital glue of economic necessity is no longer as powerful an adhesive as it once was, it still retains some relevance. With the rising costs of living, declining real wages, and job insecurity associated with a postindustrial economy, two parental incomes are necessary for most families to maintain a modest middle-class existence. Thus, the single-parent family remains at a relative economic disadvantage.

### *B. The Eroding Breadwinner/Homemaker Model*

Alternatively, women's employment may upset the breadwinner/homemaker ideal that has shaped our vision of marriage, whether by altering the economic power balance between the partners or by changing men's and women's perceptions of themselves—and in turn, creating gender role conflict which leads to divorce.<sup>114</sup> At the outset, it is important to observe that the nuclear family composed of a breadwinner father, a homemaker mother, and dependent children, is an ideal rather than a reality for most families. This image has never tracked the lived experience of working class and minority families, and increasingly it is not representative of the family structures of White middle-class Americans.<sup>115</sup> Nor was this breadwinner/homemaker ideal indicative of marital bliss for those families whose structure it did accurately describe. Domestic violence, including both wife-battering and child abuse, lurked behind the polished facades of many nuclear families,<sup>116</sup> and marital harmony was often achieved at the expense of wives' happiness and even their sanity.<sup>117</sup>

Nevertheless, the image of a traditional nuclear family has played a powerful role in shaping male and female identity in American society. Marriage, in turn,

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<sup>114</sup> See CHERLIN, *supra* note 51, at 52–53; Theodore N. Greenstein, *Gender Ideology, Marital Disruption, and the Employment of Married Women*, 57 J. MARRIAGE & FAM. 31, 40 (1995) (finding that employed women with nontraditional gender ideologies react to inequitable division of labor at home as an injustice).

<sup>115</sup> See Judith G. Gonyea & Bradley K. Googins, *The Restructuring of Work and Family in the United States: A New Challenge for American Corporations*, in THE WORK-FAMILY CHALLENGE: RETHINKING EMPLOYMENT 63, 65 (Suzan Lewis & Jeremy Lewis eds., 1996). Stephanie Coontz observes that the happy, homogenous families that dominated the 1950s images in popular culture were in part a result of the media's denial of the reality of diversity in family life. See COONTZ, *supra* note 19, at 30–31.

<sup>116</sup> See COONTZ, *supra* note 19, at 34–35.

<sup>117</sup> See *id.* at 36; BETTY FRIEDAN, THE FEMININE MYSTIQUE 252 (1964) (describing the reliance on prescription drugs and alcohol favored by many homemaking women forced to subordinate their own needs and aspirations to those of their husbands and children).

is shaped by gender-linked assumptions and expectations.<sup>118</sup> Both women and men still expect husbands to provide the primary economic support for the family, and marital discord or divorce often results when reality departs from this ideal.<sup>119</sup> Women fault men for lack of adequate commitment to the breadwinner role, or lack of ambition, even when the wife's income is sufficient to support the family.<sup>120</sup> Men fault women for being poor housekeepers or for lack of commitment to their marital and family obligations—often measured by hours spent away from the home.<sup>121</sup>

Conflict over gender identity, particularly the threat posed to the male-breadwinner identity by the presence of a wage-earning wife, is widespread among married heterosexuals.<sup>122</sup> One study found that the most common reason given for marital breakdown was conflict over gender roles.<sup>123</sup> Marriages fail

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<sup>118</sup> Women socialized into traditional gender roles are steeped in the Cinderella dream of marrying a man who will support and take care of them; for such women, duty runs to home and family, while paid work is an option. Men socialized into traditional gender roles see paid work and providing for their families as their primary duty. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 117–25 (1983). Marriage seems to solidify these attitudes. Cohabiting couples and those with less traditional socialization or attitudes, work experience that altered original perceptions of work, or financial need were more likely to be committed to an economic partnership in which both are employed. See *id.* at 125–27. Similarly, same-sex couples tend to subscribe to an egalitarian view that both should be employed in the interests of fairness. See *id.* at 127.

Interviews with gay men and lesbian women produced some very revealing insights about the relationship between work, gender identity, and the breadwinner and homemaker roles:

Unlike heterosexual men, . . . gay men do not feel obligated to support their partners. Only men in a relationship with a woman accept the duty to provide for their partners and children. On the contrary, in a gay relationship, each man is expected to work because this is part of what it means to be a man.

*Id.* at 129 (footnote omitted).

<sup>119</sup> See KURZ, *supra* note 16, at 47–52 (detailing a study finding that marital tension and failure was closely correlated with disputes over adherence to conventional gender roles); REISSMAN, *supra* note 24, at 51–52.

<sup>120</sup> See REISSMAN, *supra* note 24, at 52.

<sup>121</sup> See *id.* at 54–55.

<sup>122</sup> See BLUMSTEIN & SCHWARTZ, *supra* note 118, at 31–38.

<sup>123</sup> See STEVEN L. NOCK, *SOCIOLOGY OF THE FAMILY* 155 (1987).

According to evolutionary psychologist David Buss, infidelity is actually the most commonly cited basis for termination of a marriage. See DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 172–74 (1994). Buss relies for his conclusions on an extensive cross-cultural study by evolutionary anthropologist Laura Betzig, who analyzed data from 160 societies and found that infidelity and infertility were the most common grounds of divorce. See *id.* at 173 (citing Laura Betzig, *Causes of Conjugal Dissolution: A Cross-Cultural*

because wives expect their husbands to fulfill the provider role and the husbands' performance does not live up to their expectations; some fail because wives seek to take on some of the responsibility for breadwinning and their husbands resist; some fail because wives do not perform their traditional nurturing and caretaking roles adequately in the eyes of their husbands; some fail because husbands do not carry their share of the emotional and caretaking functions in the marriage.<sup>124</sup> Frequently secondary problems ensue, including violence, substance abuse, and adultery, which exacerbate the preexisting problems.<sup>125</sup> Marital violence in particular is closely related to perceived failure of women to stay within the contours of traditional gender roles—to behave subserviently within the marriage, to perform as homemakers, and to stay out of the waged labor market.<sup>126</sup>

Two competing explanations have been advanced for the marital tension created by the erosion of the male breadwinner/female homemaker image, and they are closely linked to the liberal and conservative stories of marriage explored in Section II.

### 1. *Liberal-Equality Idealists*

Those who adhere to a vision of marriage as a union of equals in an

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*Study*, 30 CURRENT ANTHROPOLOGY 654, 654–76 (1989)). Betzig found that adultery was cited as a cause of conjugal dissolution in 88 societies, making it the most pervasive single cause of divorce among 43 categories of causes. *See* BUSS, *supra*, at 173 (citing Betzig).

Buss explains, however, that those desiring divorce for other reasons may consciously use infidelity to exit a bad marriage. *See* BUSS, *supra*, at 174; *see also* South & Lloyd, *supra* note 110, at 29 (observing that it is at least as likely that dissatisfaction may lead to the decision to divorce and to initiate an extramarital relationship as it is that the extramarital relationship itself leads to marital conflict and divorce); *see* RIESSMAN, *supra* note 24, at 33, 50–51 (noting that infidelity may serve as the catalyst needed for a spouse to take action to end an unhappy marriage that had ended in an emotional sense long before the affair occurred). Other researchers' findings support these conclusions. Another study found that while incidence of extramarital affairs by husbands was an important primary reason for breakup in the eyes of wives, the underlying cause of extramarital affairs was characterized as either emotional or sexual incompatibility between the marital partners. *See* SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR 194–95 (1993). The popularity of adultery as a stated reason for divorce is likely due to its uniform acceptance as a marital wrong. People need a socially acceptable justification for marital dissolution, and a violation of the partner's expectations of fidelity from his or her mate fits this need. *See* BUSS, *supra*, at 174.

<sup>124</sup> *See* KURZ, *supra* note 16, at 47–52.

<sup>125</sup> *See id.* at 52–62. Higher levels of hard-living (substance abuse) and violence (more frequent and more serious) were reported by women married to working class and poor men. *See id.* at 62, 65.

<sup>126</sup> *See id.* at 67–68.

economic and romantic partnership accept the rise in marital tension and increase in divorce as a necessary evil in a society committed both to gender equality and romantic marriage. Progress toward sex equality and feminist pressure for women to enjoy access to the same opportunities that men have traditionally enjoyed collide head-on with the 1950s-era June and Ward Cleaver image of marriage. Confusion and discord are the inevitable result. Where gender roles in marriage were once clear, now they must be constantly negotiated and renegotiated, which is time-consuming and itself becomes an additional source of marital tension.<sup>127</sup>

In addition to containing the potential for greater marital disharmony, however, shifting gender roles also offer possibilities for constructing more stable and satisfying marital relations based on equality and a relationship between peers.<sup>128</sup> Pepper Schwartz's study of peer marriages revealed that "traditional couples sacrifice the elemental goals of intimacy, deep friendship, and . . . mutual respect, goals that peer marriage better serves."<sup>129</sup> Peer marriages offer the potential of more enriching work lives for women and fuller family lives for men. Employed women enjoy better physical and emotional health and higher self-esteem than homemakers, and men in dual-earner marriages report being more closely involved with their children and their children's care.<sup>130</sup>

Moreover, dual-earner, peer marriages are better insulated from the ravages of an unstable economy. They offer economic security, opportunities for career flexibility and retooling, and protection against unanticipated loss of income.<sup>131</sup> In addition, because they are not necessarily based on gender roles that tie men's identity solely to work, the relationship itself may be more durable under economic pressure. By contrast, the close connection between a man's gender identity and his paycheck in a traditional breadwinner/homemaker marriage renders such marriages vulnerable to destruction by outside forces acting on the man's ability to perform in the provider role: A faltering economy with consequences for wages and job security, an occupational sector which dries up suddenly, or accident or injury incapacitating the male from breadwinning.<sup>132</sup>

Nevertheless, the institutionalization of sex roles in the market and the powerful provider/caregiver norms that shape couples' expectations in marriage

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<sup>127</sup> See Kevin Merida & Barbara Vobejda, *Battles on the Home Front: Couples in Conflict over Roles*, WASH. POST, Mar. 25, 1998, at A1.

<sup>128</sup> See STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 98 (1997).

<sup>129</sup> See SCHWARTZ, *supra* note 80, at 3.

<sup>130</sup> See ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS, HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF* 28-29, 82 (1996).

<sup>131</sup> See *id.* at 5.

<sup>132</sup> See SCHWARTZ, *supra* note 80, at 124.

inherently undermine the potential for equality in marriage and serve to create a relationship of economic dependence of wives and children upon their husbands and fathers.<sup>133</sup> Unless paid work is restructured in a more equality-forcing direction, efforts to attain equality in marital relations will be hobbled.

## 2. *Family Values Crusaders*

Family values crusaders also acknowledge that erosion of the breadwinner/homemaker ideal is directly responsible for increases in marital tension and high divorce rates. Rather than accepting the byproducts of marital discord and divorce, however, they press for a return to the 1950s Cleaver ideal of gender roles in marriage and a resurgence of the marital permanence norm. They seek to offer men the bargain of revived prestige as breadwinner-providers and women the security of dependency as homemakers in return for enhanced commitment to marital permanence.<sup>134</sup> David Blankenhorn of the Institute for American Values is an outspoken proponent of this position. Blankenhorn specifically equates breadwinning with masculinity and male identity: “especially compared to other parental activities, breadwinning is objective, rule-oriented, and easily measurable. It is an instrumental, goal-driven activity in which success derives, at least in part, from aggression.”<sup>135</sup> In this view, the breadwinner role also structures men’s experience of parenthood, operating as a socializing agent for men and holding in check their natural biological tendencies toward “sexual promiscuity and paternal waywardness.”<sup>136</sup> For men, breadwinning is parenthood; there exists no conflict between work and family

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<sup>133</sup> See *id.* at 270–71; see also REISSMAN, *supra* note 24, at 73.

<sup>134</sup> See COONTZ, *supra* note 128, at 63; see also, e.g., BLANKENHORN, *supra* note 8, at 107–23 (characterizing male breadwinning as “a key organizing principle of our economy and society,” and arguing that the erosion of the breadwinner/homemaker model leads to the material impoverishment of significant numbers of children and the loss of the civilizing force of paternal breadwinning which directs male aggression and competitive instincts away from promiscuity and violence and toward a constructive purpose); GALLAGHER, *supra* note 8, at 184 (arguing that when husbands are able to act as primary breadwinners, women will have more options to devote themselves to their families, to building the community, or to less lucrative but more interesting paid work, and concluding that “[i]t is sex roles that set women free.”).

<sup>135</sup> See BLANKENHORN, *supra* note 8, at 116. A similar perspective on male breadwinning behavior has been offered by evolutionary psychologist David Buss. Buss reasons that women’s evolutionary preference for a mate who provides resources causes them to terminate conjugal relationships more readily when men fail to fulfill their primary role as breadwinner; additionally, men who are outearned by their wives perceive a threat to their manhood and feel great resentment. See BUSS, *supra* note 123, at 178.

<sup>136</sup> BLANKENHORN, *supra* note 8, at 3, 26–42.

because by meeting their obligations as workers men meet the obligations of husband and parent.<sup>137</sup>

In this view, women's entry into the paid labor force is the cause of the rise in marital tension; the solution is restoration of the breadwinner/homemaker model and women's retreat from the market sphere.<sup>138</sup> Because the individualistic-competitive ethic of the (male) market is fundamentally incompatible with the collective, altruistic, and cooperative ethic of the (female) family, women who cross into the market realm inevitably experience market work and family as conflicting.<sup>139</sup> In short, work-family conflict and marital discord caused by shifting gender roles can be avoided by a return to separate gendered spheres of home and market.

Even if such a solution were politically palatable and the marital contract were made permanent, we could not turn back the clock on the norm of gender equality. While economic dependence of women on men might slow the divorce rate, we could very well be left with more troubled marriages. Now that the equality norm is so widely embraced, even traditional homemakers are likely to resist domination by their provider-spouses, and marriages will be fraught with

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<sup>137</sup> See *id.* at 109.

<sup>138</sup> See David Blankenhorn, *American Family Dilemmas*, in *REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* 10–12 (David Blankenhorn et al. eds., 1990); see also COONTZ, *supra* note 19, at 40–41. Blankenhorn's analysis is reminiscent of earlier analyses of women's liberation and paid employment as the cause of family breakdown. See BRUCE, *supra* note 62, at 129–36, 141–42 (arguing that wives' entry into the waged labor force as a part of the growth and spread of capitalism brought market forces to bear on the home and family, forcing men and women to compete with one another in the struggle for subsistence, and children to suffer, and substituting values of equality, individualism, and independence for cooperation, mutual responsibility, and dependency; ultimately, conjugal happiness was sacrificed). Like modern critics, such writers recommended stricter marriage and divorce laws in order to address the problem. See *id.* at 184.

<sup>139</sup> See BLANKENHORN, *supra* note 8, at 110.

As Coontz points out, neither Blankenhorn nor other conservative commentators (including Karl Zinsmeister of the American Enterprise Institute, Allan Carlson, president of the Rockford Institute on the Family, conservative lecturer Connie Marshner, and Allan Bloom, author of *The Closing of the American Mind* (1987)) see it as a social problem that men's ethic should be one of individualism; because their appropriate social role is as breadwinner, an individualistic ethic is tolerable, even desirable. It is only when the workplace ethic of individualism spread to women, the historical mediators between individualism-competition in the market and altruism-cooperation in the family, that family breakdown and the demise of family values became a crisis. Because these commentators see the problem as beginning with women's entry into the labor market in significant numbers, it is understandable that their programs for reform do not challenge market values or individualistic tendencies in the larger society, but instead seek to return women to the role of compensating in the family for the individualism that is accepted as the norm in the marketplace. See COONTZ, *supra* note 19, at 40–43.



discord as a result. Eliminating the obvious sources of discord created by women's labor market role may simply force the resentment wives feel for lack of appreciation of their contribution to the marital partnership underground.<sup>140</sup>

### *C. No Family Is an Island: The Impact of Market Pressure*

While it is certainly true that the erosion of the marital permanence norm, the advent of no-fault divorce law, increased financial autonomy of women, and changes in gender roles have facilitated divorce, shifts in the labor market have also impacted family relationships. In order to address the problem of the rising divorce rate, would-be reformers must look beyond the contours of the family and family law and into the arena of paid work.

Historically, the separation between market and home was maintained by excluding women from the market or limiting their participation there through law; cultural norms and the assignment of the caretaking and nurturing roles to women have continued the separation to some degree in the modern world. The historical separation between market and home effectively depended on women functioning as moral gatekeepers who maintained one set of values in the home while another prevailed in the market. Marriages were more stable where such an arrangement prevailed. Marriages in which this was not possible—in which the wife was forced into the market by economic circumstances—were always less stable than those where a separation of functions was possible.

The increase in the number of dual-earner marriages thus suggests yet another explanation for the high divorce rate: Market pressure on the breadwinner/homemaker ideal. The financial need for both spouses to engage in paid work structures expectations in modern marriages.<sup>141</sup> While traditionally the husband's unemployment or underemployment was the most significant stressor on marriage, modern marriages undergo stress if the wife is unemployed or underemployed as well. Although men's gender identity may be threatened by

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<sup>140</sup> See SCHWARTZ, *supra* note 80, at 119 (describing tendency of traditional homemakers to express resentment over their lack of marital power through subterfuge, lying to their husbands about prices, and their "profits" in private discretionary funds). *But see* Greenstein, *supra* note 114, at 40 (finding support for the hypothesis that employed women who hold traditional views about gender roles in marriage are less likely than employed women with nontraditional views to perceive the gender gap in hours spent on housework as inherently unfair, and therefore less likely to experience marital conflict over the issue).

<sup>141</sup> Fifty-seven percent of divorced couples point to financial problems as the cause of marital failure. See *Why Money Is the Leading Cause of Divorce*, JET, Nov. 18, 1996, at 34, 34. More recently, a survey of 300 couples done by the Washington Post, the Kaiser Family Foundation, and Harvard University revealed that 52% of women and 49% of men said that "not having enough money" caused stress "very often" or "somewhat often" in their lives. See Merida & Vobejda, *supra* note 127, at A1.

their wives' employment if their wives usurp the breadwinner role by outearning them, most men expect their wives to be financial partners who will support family breadwinning with market work.<sup>142</sup>

### 1. *Marital Instability and Class Status*

The classic illustration of the impact of the labor market on marital harmony is found in research on working-class families, where dual-provider patterns have long prevailed. Perhaps not coincidentally, divorce rates have always been highest among working-class and poor people.<sup>143</sup>

William Goode was the first researcher to find an inverse correlation between socioeconomic class and likelihood of divorce; previous researchers had assumed that divorce was more likely among the upper and middle classes.<sup>144</sup>

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<sup>142</sup> See Merida & Vobejda, *supra* note 127, at A1; see also Joseph H. Pleck, *The Work-Family Role System*, in *WORK & FAMILY: CHANGING ROLES OF MEN AND WOMEN* 8, 15 (Patricia Voydanoff ed., 1984).

<sup>143</sup> See GUTTMANN, *supra* note 13, at 4, 15-18. When family income drops 25%, divorce rises by more than 10%. See LILLIAN B. RUBIN, *FAMILIES ON THE FAULT LINE: AMERICA'S WORKING CLASS SPEAKS ABOUT THE FAMILY, THE ECONOMY, RACE, AND ETHNICITY* 121 (1994).

Divorce rates are particularly high for African Americans, who tend to share with poor whites problems of unemployment, lack of education and economic insecurity. See CHERLIN, *supra* note 51, at 95; GUTTMANN, *supra* note 13, at 24-25; KURZ, *supra* note 16, at 22. Ten years after marriage, 47% of Black couples have separated or divorced, while only 28% of White non-Hispanic couples have separated or divorced. See Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 *FUTURE CHILDREN*, Spring 1994, at 29, 32.

Stephanie Coontz suggests that the African-American divorce rate bears witness to the fact that Black Americans are simply the first of the "postindustrial discards," those who have been forced to shoulder the brunt of the restructuring of the U.S. economy; what happened to Black Americans on the frontline of this economic battle will certainly "trickle up" to all low-income and working-class Americans. See COONTZ, *supra* note 19, at 253-54; WILLIAM J. GOODE, *THE FAMILY* 159 (1982) [hereinafter, GOODE, *THE FAMILY*] (suggesting that Blacks have more employment instability during depressions and show a wider fluctuation than Whites in divorce rates over the economic cycle, and predicting that with the assimilation of Blacks into White society the divorce patterns of the races will become more similar).

<sup>144</sup> See KURZ, *supra* note 16, at 21-22; Helen J. Raschke, *Divorce*, in *HANDBOOK OF MARRIAGE AND THE FAMILY* 597, 603 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1987). The erroneous impression that divorce was a problem of the middle and upper class may have its roots in the historical fact that impediments to divorce in law restricted divorces to the more privileged classes. See GOODE, *THE FAMILY*, *supra* note 143, at 156-58.

Looking at income for male heads of households as reported in the 1950 census, Goode found that proneness to divorce decreased as income rose. See WILLIAM J. GOODE, *AFTER DIVORCE* 53-55 (1956). In later studies based on the 1970 census data, Goode found similar

Several explanations for the link between divorce and lower socioeconomic status emerged. First, lower-status occupations produce less occupational satisfaction as well as less income, and the resulting dissatisfaction may be expressed within marriage.<sup>145</sup> Other studies suggest that income itself—rather than occupation or level of educational attainment—is associated with marital stability or instability.<sup>146</sup> Low income is often associated with job instability and unemployment, as well as health problems and housing difficulties, which contribute to marital tension and have been causally linked to divorce.<sup>147</sup> Additionally, economic disincentives to divorce that exist for more affluent couples are absent for those in lower socioeconomic positions. Without significant property to divide or a high-income wage stream at risk of loss (for the dependent spouse) or reduction (for the wage-earner via child support or alimony), lower-income couples have less to lose at divorce than middle- or upper-class couples do.<sup>148</sup>

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patterns by male income and occupation. See GOODE, *THE FAMILY*, *supra* note 143, at 156–57.

<sup>145</sup> See GOODE, *THE FAMILY*, *supra* note 143, at 157; NOCK, *supra* note 123, at 150.

<sup>146</sup> See Phillips Cutwright, *Income and Family Events: Marital Stability*, 33 J. MARRIAGE & FAM. 291, 295 (1971). Cutwright explained the correlation between income and marital stability by reference to gender roles:

It is reasonable to expect that male income will be more important to marital stability than social status derived from years of education or occupational position because income is more directly linked to consumption than either of the other two status indicators. Consumption . . . provides the wife with a constant empirical monitoring of how well her husband is doing in his role as breadwinner. A satisfactory level of consumption should help the wife maintain her own feelings of competence in her role of wife and homemaker, and should act to reinforce her positive view of her husband. Of course, the husband's view of himself as an adequate provider may also be directly linked to his evaluation of his current earnings and prospects for future income growth.

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High income couples are more likely than low income couples to be high on feelings of mutual respect and affection due to the effect of high income in producing a strong mutual positive evaluation of the husband's role as breadwinner . . . . This positive evaluation creates feelings of satisfaction with the marriage, and the satisfied couple will be more likely to remain together.

*Id.* at 296.

<sup>147</sup> See NOCK, *supra* note 123, at 150. Several subsequent studies reveal that it is financial insecurity rather than low income per se that is associated with marital instability; low-income couples with stable income tend to have more stable marriages than those who suffer economic upset. See GUTTMANN, *supra* note 13, at 16; Raschke, *supra* note 144, at 604.

<sup>148</sup> See GOODE, *supra* note 12, at 331; NOCK, *supra* note 123, at 150; Cutwright, *supra* note 146, at 296.

## 2. Gender Roles and Class Status

The connection between marital instability and class status has a distinctly gendered aspect: *Who* earns the income is very significant. Overall, there is a positive relationship between wives' earnings and marital disruption, but the relationship is mediated by the ratio between husbands' and wives' earnings. The more the wife's earnings approach, equal or exceed the husband's, the higher the risk of marital disruption.<sup>149</sup> Such income parity is more likely to exist in working-class families than in upper-class families, hence, the higher divorce rate for working-class couples.

Moreover, it is more difficult for working-class men and women to fulfill the idealized gender roles of breadwinner and homemaker. Working-class men are almost by definition inadequate breadwinners in today's market because they typically cannot earn enough to support their families single-handedly.<sup>150</sup> The threat to men's gender identity posed by a perceived failure to provide for their families is exacerbated when their wives enter the labor force or take on additional jobs to support the family.<sup>151</sup>

Working-class women, too, experience a threat to gender identity posed by their market work.<sup>152</sup> Working-class women pressed into the waged labor market by economic necessity inevitably fall short of the full-time homemaker ideal, and must squeeze homemaking duties around the demands of paid labor.<sup>153</sup> Working-class women employed in traditionally male occupations

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<sup>149</sup> See Raschke, *supra* note 144, at 604; see also SHARON J. PRICE & PATRICK C. MCKENRY, *DIVORCE* 30 (1988). One study found that the divorce rate is 50% higher among couples where the wife outearns the husband than among those where the husband outearns the wife. See BUSS, *supra* note 123, at 178 (citing ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* (1981)). Whether wives' increased income increases the likelihood of divorce because it makes it possible for them to live independently or whether it increases marital tension because the wife's income threatens the husband's breadwinner status is unclear. See LESLIE A. MORGAN, *AFTER MARRIAGE ENDS: ECONOMIC CONSEQUENCES FOR MIDLIFE WOMEN* 32 (1991).

<sup>150</sup> See WILLIAMS, *supra* note 76, at 29. Thus, as male income drops, the probability of divorce rises; as male income rises, the probability of divorce drops. See SUZANNE M. BIANCHI & DAPHNE SPAIN, *AMERICAN WOMEN IN TRANSITION* 27-28 (1986).

<sup>151</sup> See KURZ, *supra* note 16, at 22; see also FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* 136-37 (1986) (noting that lower-class men are particularly affected); GOODE, *THE FAMILY*, *supra* note 143, at 157; RUBIN, *supra* note 143, at 115 (sense of manhood under threat); Pleck, *supra* note 142, at 15.

<sup>152</sup> See KURZ, *supra* note 16, at 109.

<sup>153</sup> See Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 534-35 (1999) (explaining that women affirm their femininity by performing housework and mothering tasks).

experience significant marital conflict and problems in reconciling their work roles with their own and their husbands' perceptions of themselves as feminine.<sup>154</sup> Wives who have assumed the role of economic partner have heightened expectations about their husbands' obligations in the home, and thus are more likely to resent men's failure to assist with housework.<sup>155</sup>

Marital instability—as well as a host of problems that contribute to it, including domestic violence, drug abuse, and alcoholism—is thus highly correlated with perceived inability to fulfill traditional gender roles in marriage. As more middle- and upper- class women work full time in occupations similar to their husbands', the discrepancies between the incomes of middle- and upper-class women and their husbands will drop, and the divorce rate for these groups is predicted to rise.<sup>156</sup> Thus, it appears that working-class families' work and family patterns may be predictive across all income levels as more and more women enter the labor force and the gender wage gap diminishes.<sup>157</sup>

### 3. *Dual-Earner Married Couples*

Regardless of social class, the divorce rates of dual-earner couples have outpaced those of single-earner families.<sup>158</sup> One study suggested that time is the

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<sup>154</sup> See Jean Reith Schroedel, *Blue-Collar Women: Paying the Price at Home and on the Job*, in *THE EXPERIENCE AND MEANING OF WORK IN WOMEN'S LIVES*, 241, 255–57 (Hildreth Y. Grossman & Nia Lane Chester eds., 1990).

<sup>155</sup> In short:

In the past there was a clear understanding about the obligations and entitlements each partner took on when they married. He was obligated to work outside the home, she would take care of life inside. He was entitled to her ministrations, she to his financial support. But this neat division of labor with its clear-cut separation of rights and obligations no longer works. Now, women feel obliged to hold up their share of the family economy—a partnership men welcome. In return, women believe they're entitled to their husband's full participation in domestic labor.

RUBIN, *supra* note 143, at 87.

<sup>156</sup> See GOODE, *supra* note 12, at 332–33.

<sup>157</sup> Indeed, researchers performing an empirical study of the relationship between class and the gendered domestic division of labor were surprised to discern that location within the class structure was not correlated with the amount of household work performed by husbands in their dual-earner marriages. See Erik Olin Wright et al., *The Non-Effects of Class on the Gender Division of Labor in the Home: A Comparative Study of Sweden and the United States*, 6 *GENDER & SOC.* 252, 276 (1992).

<sup>158</sup> See Janet Saltzman Chafetz & Jacqueline Hagan, *The Gender Division of Labor and Family Change in Industrial Societies: A Theoretical Accounting*, 27 *J. COMP. FAM. STUD.* 187, 210 (1996).

problem: Time spent by wives in market labor increases the likelihood of divorce because it interferes with the completion of homemaking tasks traditionally assigned to women, in turn causing marital tension. This is particularly problematic and likely to lead to divorce among couples who lack sufficient income to purchase household services such as housecleaning and child care.<sup>159</sup>

The time crunch created by the shift in women's opportunities for waged work leads to battles over the division of household labor, which is another defining aspect of gender identity for many couples. A substantial portion of marital conflict appears to center around the division of housework when both partners are in the waged labor market. When husbands do a lot of housework, married couples' conflicts increase; some researchers have concluded that "[m]arried men's aversion to housework is so intense it can sour their relationship."<sup>160</sup> Not only are employed women likely to perceive inequity, feel resentment, and initiate discussions about the unequal division of household labor between themselves and their husbands, but decreases in marital interaction time caused by the double shift may further undermine the marital bond.<sup>161</sup>

Arlie Hochschild's path-breaking research on the division of household work between men and women confirms the central role that conflicts of gender ideology play in marital discord. According to Hochschild, when men's breadwinner-based gender identities are threatened by women's performance of the financial provider role, men retaliate by refusing to assume the burdens of the unpaid "second shift,"—the work of keeping a house and caring for children.<sup>162</sup> Husbands, feeling that their wives' higher earnings shame them as men, are forced to absorb a cultural assault on their manhood occasioned by the fact that their wives outearn them or are otherwise assuming too large a percentage of the

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<sup>159</sup> See Glenna Spitze & Scott J. South, *Women's Employment, Time Expenditure, and Divorce*, 6 J. FAM. ISSUES 307, 323 (1985). However, the time deficit explanation for marital tension appears most powerful for middle-income couples; there is a lower correlation between wives' hours worked and likelihood of marital disruption for couples with incomes at the bottom of the income scale than is present at middle-income levels, suggesting that couples with family incomes at the bottom of the scale are less likely to divorce than those at middle-income levels, possibly because they cannot afford to divorce and maintain two households. *See id.*

<sup>160</sup> *Id.* at 146.

<sup>161</sup> *See id.* at 311–12.

<sup>162</sup> See ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 220–22 (1989). Further support for this is provided by Karen Pyke's research, which found that husbands who were chronically unemployed or were mired in low occupational status devalued their wives' market work and perceived it as "a burden rather than a gift in their marital economy of gratitude." Karen D. Pyke, *Women's Employment as a Gift or Burden? Marital Power Across Marriage, Divorce, and Remarriage*, 8 GENDER & SOC. 73, 75 (1994).

traditional male role. They react by expecting gratitude and concessions from their wives, concessions that are often made on the terrain of the division of household labor.<sup>163</sup> The more money a woman earns relative to her husband, the more unequal the allocation of household labor seems to be, with the woman frequently performing a larger share of the household work in order to shore up her husband's fragile gender identity.<sup>164</sup> This dynamic is particularly stark in situations where the husband is unemployed; these husbands do less housework the more they depend on their wives for income, apparently because "[r]esisting 'women's work' . . . [is] one of the few sources of marital power remaining to the unemployed husband, and one of the only ways he can define his masculinity."<sup>165</sup>

Thus, while a rational economic theory of exchange would suggest that the more paid labor market work a woman performs, the greater her bargaining power will be within the marriage, and the less nonmarket work she will do, women who out-earn their husbands actually do *more* housework than those whose husbands out-earn them, or who earn an amount roughly equal to that of their husbands.<sup>166</sup> Hochschild concluded that women who out-earned their husbands felt the need to do more housework in an effort to restore the gender power balance to their marriage that had been upset by the shift away from the traditional male breadwinner/female homemaker norm.<sup>167</sup> "Forced to choose between equality and marriage," most of the women Hochschild studied chose marriage, repressing their anger and simultaneously paying a price in terms of workload, exhaustion, and self-knowledge.<sup>168</sup>

The structure of the labor market functions as a powerful force maintaining

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<sup>163</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 83–85; Pyke, *supra* note 162, at 79–81.

<sup>164</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 220–22 (explaining the principle of marital "balancing": If men lose power in the economic aspect of the relationship, women restore their husbands' lost power by doing more of the second shift work at home).

<sup>165</sup> SPAIN & BIANCHI, *supra* note 56, at 170; see also Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652, 682 (1994) (finding that economically dependent husbands do less housework the more they depend on their wives for support, and that this phenomenon is most pronounced in low-income households).

<sup>166</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 221–22.

<sup>167</sup> See *id.* at 222; see also Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 AM. SOC. REV. 327, 344 (1994) (finding that division of housework between spouses becomes a "symbolic enactment of gender relations" and that the gender gap in time spent on housework is greatest in married couple households relative to other households).

<sup>168</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 46–57 (describing one woman's accommodation to her husband's resistance to change).

the gendered division of labor at home. Men and women are channeled into jobs segregated by sex, correlated with expectations about whether the person filling them is likely to be performing a breadwinner role or a caretaker role, and paid accordingly.<sup>169</sup> Where jobs that correlate with caretaking are systematically underpaid relative to jobs that correlate with breadwinning, those in the caretaking-compatible jobs (typically women) are forced into primary caretaking roles because the larger income source (the breadwinning job) must be protected; when children are sick or teacher-parent conferences are scheduled in the middle of the work day, the parent with the caretaking-compatible job attends. Over time, equal child-care contribution becomes impossible.<sup>170</sup> Thus, the gender wage gap, the dead-end nature of the jobs available to most women, and the incompatibility of the conventional work structure with child care responsibilities combine to render women more economically dependent than men on marriage, and many women's fear of divorce causes them to stop short in confrontations with their husbands over the division of household work.<sup>171</sup>

Hochschild concluded that the single most important indicator of marital happiness was the husband's willingness to share the second shift.<sup>172</sup> To Hochschild, it appeared that marriage itself might be at stake in the battle over who will do the unpaid, undervalued work of homemaking and caring for children.<sup>173</sup> Others have suggested that the adequate socialization, care, and

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<sup>169</sup> See SCHWARTZ, *supra* note 80, at 169–70. Indeed, given the way that some jobs are currently structured, there may be some occupations (such as doctor, lawyer, or high-ranking corporate executive) which are incompatible with peer marriages. See *id.* at 130–31. Certainly there are some jobs that are incompatible with involved parenting. See Sue Shellenbarger, *Woman's Resignation from Top Pepsi Post Rekindles Debates*, WALL ST. J., Oct. 8, 1997, at B1 (describing readers' reaction to Brenda Barnes' resignation from her post as head of PepsiCo's North American beverage business to spend more time with her family, and noting that the move has illuminated the personal costs associated with high-level corporate executive positions, exposing the extreme separation of work and family or personal life that is required for success in such positions).

<sup>170</sup> See SCHWARTZ, *supra* note 80, at 170. The gendered nature of the homemaker-caretaker role means that it is women, rather than men, who typically worry about finding ways to manage work and family. See *id.* Even where men take over some family caretaking work, they typically do not assume responsibility for planning and organizing the child care and domestic work; it is women who anticipate needs and remember schedules. The conventional pattern is for the male partner to provide assistance to the female partner, serving as a "back-up" caretaker rather than as a coequal caretaker. See DOWD, *supra* note 74, at 57.

<sup>171</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 140, 249, 253.

<sup>172</sup> See *id.* at 211–12.

<sup>173</sup> See *id.* at 215; see also Chafetz & Hagan, *supra* note 158, at 210–11 (describing the relatively unshared "second shift" worked by employed married women and the marital conflict that erupts over the issues as a major reason for increased motivation to divorce).



parenting of children may be at stake as well.<sup>174</sup>

#### 4. Summary

In short, the most likely explanation for the relationship between women's labor market participation and the rising divorce rate is a confluence of factors that revolve around the shift to a postindustrial labor market and the corresponding alterations in gender roles and cultural norms, including the norm of marital permanence.<sup>175</sup> As Hochschild has observed, "the gender revolution is primarily *caused* by changes in the economy [the decline in the purchasing power of the male wage, and the rise of job opportunities for women], but people *feel* it in marriage."<sup>176</sup> Thus, in order to fully address the problem of divorce, we must look beyond marriage to the market.

### IV. HOME AND MARKET: SEPARATE SPHERES BOUNDED BY GENDER

This Part makes the case that the labor market and marital dynamics are inextricably linked. The shift to a postindustrial economy in which women are full participants and the accompanying transformation of the gender order have ripple effects on gender roles within the family. Similarly, the demise of the old social contract between employers and workers featuring lifelong employment, and the concomitant shift to a limited term model has inevitably impacted workers' behavior and the values they internalize. As market values become centered around self-interest, productivity, efficiency, and achieving short-term objectives, so do family values. As the employer-worker relationship moves away from permanence, so do marital relationships.

#### A. Gender Roles and the Market

In the United States, gender identity has traditionally been closely correlated with one's place in the market. Paid employment in the industrial era was

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<sup>174</sup> See HEWLETT, *supra* note 20, at 72–85; see also HOCHSCHILD & MACHUNG, *supra* note 162, at 197–98, 209–10 (describing strategies of cutting back on child care or minimizing the emotional needs of the family).

<sup>175</sup> See Raschke, *supra* note 144, at 600–01. Disentangling cause and effect is difficult, if not impossible. While economic independence for women makes it possible for women to leave bad marriages, failure to conform to traditional sex roles within a marriage also causes tension and marital strife. With the demise of social taboos against divorce, divorce becomes a viable solution to marital strife. See Kristin A. Moore & Isabel V. Sawhill, *Implication of Women's Employment for Home and Family Life*, in *WORK & FAMILY: CHANGING ROLES OF MEN AND WOMEN* 153, 157–58 (Patricia Voydanoff ed., 1984).

<sup>176</sup> HOCHSCHILD & MACHUNG, *supra* note 162, at 257–58 (emphasis in original).

premised on a male-headed nuclear family in which the division of labor was gendered, with the husband serving as the breadwinner and the wife performing homemaking and childcaretaking tasks.<sup>177</sup> Government support for this system took the form of social insurance programs designed to replace the male wage in the event of sickness, disability, unemployment, retirement, or death. Public assistance programs provided means-tested aid to needy families that did not conform to the male-headed nuclear family model.<sup>178</sup>

In industrial society, organized workers struggled to attain the goal of a “family wage”—one that could be earned by a male breadwinner alone and was sufficient to support an entire family, so that women might assume the role of nonwaged homemakers.<sup>179</sup> The “family wage” was thus in effect a male wage.<sup>180</sup> The family wage in turn shaped gender identity:

As the family wage held the promise of female homemaking, [and] . . . explicitly incorporated wife and children, [it] excluded the possibility that female dignity could inhere either in a woman’s ability to earn wages or in her capacity to support a family. Because the living wage idealized a world in which men had the privilege of caring for women and children, it implicitly refused women that privilege. And, because it assumed female dependency, to imagine female independence impugned male roles and male egos.<sup>181</sup>

Ultimately, the cultural ideal of a breadwinning man earning a family wage sufficient to support a dependent wife and children came to shape expectations of what constituted the just and proper social order.<sup>182</sup>

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<sup>177</sup> See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* 41 (1997).

<sup>178</sup> See *id.* at 41–42.

<sup>179</sup> See Alice Kessler-Harris, *The Wage Conceived: Value and Need as Measures of a Woman’s Worth*, in *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 6, 8 (1990).

<sup>180</sup> See *id.* The family wage had the effect of depressing women’s wages, since a woman’s wage “reflected not what was but what ought to be. That men ought to be able to support wives and daughters implied that women need not engage in such support. They ought to be performing [unwaged] home duties.” *Id.* at 8, 15.

<sup>181</sup> *Id.* at 10. “Thus, ‘a woman’s wage’ became a term of opprobrium among men. A male worker could not legitimately be compared with a female worker without violating his sense of dignity and justice.” Alice Kessler-Harris, *The Just Price, the Free Market, and the Value of Women*, in *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES*, *supra* note 179, at 113, 122 (1990).

<sup>182</sup> See Kessler-Harris, *supra* note 179, at 9. The family wage “affirmed and supported” the male-headed nuclear family, ensuring women’s attachment and investment in family and providing men with incentives toward market achievement and upward social mobility. *Id.* at 19.

With the transition to a postindustrial phase of capitalism and the crumbling of the old gender order, the family wage ideal no longer describes or fits the vast majority of households. Few jobs pay a wage sufficient to support a family, many lack essential benefits such as health insurance, and employment is increasingly unstable.<sup>183</sup> The old forms of support provided by the welfare state no longer offer protection from the uncertainties of this postindustrial world. Financial pressures have combined with shifting gender norms to press the vast majority of women into the market.

Working mothers increasingly resemble the profile of working fathers—employed full-time, continuing to work through children's summer vacations, and staying in the workforce rather than moving out of it during childbearing years.<sup>184</sup> Attempting to divide three full-time jobs between two parents is

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<sup>183</sup> See FRASER, *supra* note 177, at 42.

<sup>184</sup> See HOCHSCHILD, *supra* note 109, at 7. Seventy percent of mothers with children under six work outside the home. See Ruth Sheehan, *Why Are Mothers Still at War Over Work?*, RALEIGH NEWS & OBSERVER, July 13, 1997, at 23A, 24A. Fifty percent of mothers with children under a year work outside the home. See *id.*

The labor market is hostile to mothers with childbearing or childrearing obligations. Mothers who attempt to cut their hours or reduce their workloads to accommodate the pressures of childbearing and childrearing increasingly feel pressure to return to full-time work so that they will not be viewed as marginal, expendable, and therefore vulnerable to layoffs. See Louis Uchitelle & N.R. Kleinfield, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at A28. Such fears are not exaggerated. See *Rhett v. Carnegie Ctr. Assocs.*, 129 F.3d 290, 299 (3d Cir. 1997) (finding no violation of Title VII or the Pregnancy Discrimination Act where employer terminated female workers on maternity leave; consideration of employee's absence of work attributable to pregnancy in making decisions as to which positions to eliminate in downsizings is not discriminatory if the employer would not overlook comparable absences of nonpregnant employees); *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151 (7th Cir. 1997) (finding that pregnant attorney laid off during a corporatewide reduction in force because she worked part-time to accommodate responsibilities to existing children, violated neither Title VII, the Pregnancy Discrimination Act, nor the Family and Medical Leave Act); see also *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 341–42 (8th Cir. 1997) (finding that demotion of female employee to a position with half the salary that she had earned in her previous position while she was on maternity leave did not violate the Pregnancy Discrimination Act or the Missouri Human Rights Act even though she was told that she was being given a position "for a new mom to handle," since discrimination was related only to new parent status rather than to pregnancy or to sex; "an individual's choice to care for a child is not a 'medical condition' related to childbirth or pregnancy . . . it is a social role chosen by all new parents who make the decision to raise a child"); Barbara Yuill, *In Separate Rulings, Courts Reject Claims Brought by New Mothers Who Lost Jobs*, Daily Lab. Rep. (BNA) No. 122, at A-1 (June 25, 1997) (citing *Lorance v. Daikin Am. Inc.*, CV-96-S-1521 (D.C. Ala. June 18, 1997) (finding that employer who terminated female finishing operator whose job required 12 hour shifts alternating between day and night hours following the birth of her second child did not violate the Pregnancy Discrimination Act, the Americans with Disabilities Act, or Alabama tort law when it refused her request for 8-hour shifts during daylight hours and to be

inevitably stressful. As long as paid employment is premised upon the assumption that a wage-earner parent is supported by a flow of services from a homemaker-spouse, even the best-intentioned married couples will confront problems in fitting their family lives together with their jobs.

The presence of children underscores the poor fit between work and family obligations for dual-earner couples. Couples who can afford it tend to revert to traditional breadwinner/homemaker roles following the birth of a child rather than struggling to parent within jobs whose structure is hostile to caregiving.<sup>185</sup> Dual-earner couples who choose this path experience a decline in marital satisfaction associated with parenthood: "Women resent the backsliding in equality, while men are either stressed by their heightened breadwinning responsibilities or confused by their wives' lack of appreciation for their resumption of the main provider role."<sup>186</sup>

The impact of the poor fit between paid work and caretaking obligations is greatest on working-class couples, who lack the resources to subcontract their household duties and caretaking obligations.<sup>187</sup> Ironically, blue-collar jobs are characterized by the most inflexible schedules, so both parents in a working-class marriage typically lack the support from their employers that at least some white-collar workers enjoy.<sup>188</sup> Many blue-collar couples cope by utilizing split

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placed on light duty work to accommodate medical problems stemming from a hysterectomy caused by a pregnancy-related medical condition; employer had no obligation to restructure job to accommodate a new mother) [reported in]; *see generally* Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 62-64 (1997) (arguing that the legal protections afforded to pregnant women in the U.S. are grossly inadequate, in part because the U.S. market is dominated by the capitalistic discourse of laissez-faire economics, and in part because U.S. labor and employment policy fails to focus on the real beneficiaries of workplace accommodations, children and the larger society).

<sup>185</sup> *See* COONTZ, *supra* note 128, at 71.

<sup>186</sup> *Id.*

<sup>187</sup> *See* HOCHSCHILD & MACHUNG, *supra* note 162, at 189.

<sup>188</sup> Some of the worst scenarios occur when employers unilaterally switch their blue-collar workforces to shift schedules that are incompatible with available child care. *See* Sue Shellenbarger, *Work & Family: Some Employers Find Way to Ease Burden of Changing Shifts*, WALL ST. J., Mar. 25, 1998, at B1.

The problem of inflexible work hours that are incompatible with available child care is most pronounced for single mothers employed at the bottom end of the occupational hierarchy. Such jobs are characterized by rigid work schedules and are often nonunion, so that employers may alter working hours with no prior notice. *See* Peggy Kahn & Linda M. Blum, *Not Just 9 To 5 The Problems of Nonstandard Working Hours*, WORKING USA Nov./Dec. 1998, at 51, 52-53. Even in unionized workplaces where employer actions are constrained by contract or by a duty to bargain with the union prior to making shift changes, single mothers are disadvantaged by seniority-based preference systems. Young mothers lacking seniority are disproportionately assigned to afternoon or night shifts incompatible with existing child care.

shifts, or juggling child care by working alternating shifts and sacrificing time together—and often the marriage itself—in the process.<sup>189</sup>

### B. *Internalizing Market Values*

How are dual-earner families negotiating the often-conflicting demands of paid work and family obligations? How significant a role do existing “family friendly” employer-initiated work policies play in their lives? And when values privileged in the market conflict with those historically governing family life, which do families heed? To answer these questions, sociologist Arlie Hochschild studied workers at a company with “family-friendly” workplace policies of two types: (1) policies designed to enable workers to spend more time at work (including child care, child care for sick children, emergency backup child care, before- and after-school programs, and referral services for elder care), and (2) policies designed to assist parents to work more flexible or shorter work days (including flex-time, options for part-time work, job sharing, and work at home, paid maternity leave for up to ten weeks surrounding the birth or adoption of a child, and up to twenty weeks of unpaid family care leave for each child born or adopted).<sup>190</sup>

Hochschild found that despite this range of family-friendly policies, a management culture that encouraged workers to take advantage of them, a workforce that was largely composed of persons who were members of two-earner marriages or had no stay-at-home spouse, and an average full-time employee work week of forty-seven hours per week, very few workers took advantage of the policies designed to allow them to cut back on worktime and to make more time for family, while the programs that allowed parents to spend more time at work were in high demand.<sup>191</sup> The sole exception to this rule was

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*See id.* at 52.

<sup>189</sup> See Jeylan T. Mortimer & Jayne London, *The Varying Linkages of Work and Family*, in *WORK & FAMILY: CHANGING ROLES OF MEN AND WOMEN* 20, 29–30 (Patricia Voydanoff ed., 1984); Sue Shellenbarger, *Work & Family: For the Burseks, Best Parent Regimen is Back-to-Back Shifts*, WALL ST. J., Feb. 25, 1998, at B1. One-third of all dual-earner couples with children under five work back-to-back shifts in order to ensure that one of them will always be available to care for the children. *See id.* at B1. While such arrangements avoid the necessity of child care and nurture close parent-child relationships, couples who utilize them are at substantially higher risk of divorce than other couples due to the lack of time spent together. *See id.*

<sup>190</sup> *See* HOCHSCHILD, *supra* note 109, at 22–23.

<sup>191</sup> *See id.* at 25. Less than 3% of eligible employees with children 13 years of age and under worked part-time (defined as less than 35 hours per week and carrying either full or prorated benefits); less than 1% of eligible employees shared a job (a full-time position with salaries and benefits prorated between 2 people); only 1% of employees took advantage of

"flextime," a policy which allowed workers to come and go early or late: By 1993 one-quarter of all workers and one-third of all working parents at this company took advantage of flextime to rearrange work hours—but not to cut back on them.<sup>192</sup> Indeed, Hochschild found that workers with young children actually worked more hours than those without children—even when they were salaried workers who were not paid directly for this time.<sup>193</sup>

Hochschild considered several reasons for this trend. First, perhaps working parents could not afford to work fewer hours. However, Hochschild found an inverse relationship between pay levels and interest in part-time work: The higher their income, the less likely women were to express interest in part-time work, while lower-income mothers were much more interested in part-time opportunities; few men at any income level expressed interest in part-time work.<sup>194</sup> Nor were workers at this company afraid of being laid off, working overtime because they were "working scared."<sup>195</sup> Even in the few downsized divisions of the company, overtime hours were no greater than those in the stable, nondownsized divisions.<sup>196</sup>

Second, Hochschild wondered whether workers lacked information about the family-friendly policies or were blocked from taking advantage of them by unhelpful supervisors. Yet she found that most workers knew about the family-friendly policies, or at least knew of them and how to obtain more detailed information should they wish it, believed the company was sincere in offering these options, and took advantage of the options nearly equally in departments with friendly, progressive supervisors and in departments with more resistant

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"flexplace" programs (allowing work to be done at home). *See id.* at 26. According to Hochschild, this low level of employee usage of family-friendly policies in the second category is typical of other large companies as well. *See id.* at 27.

<sup>192</sup> *See id.* at 26.

<sup>193</sup> *See id.* at 26–27. Almost half of today's dual-earner families feature at least 2 parent working more than 40 hours per week. *See* Phyllis Moen & Donna I. Dempster-McClain, *Employed Parents: Role Strain, Work Time, and Preferences for Working Less*, 49 J. MARRIAGE & FAM. 579, 587 (1987).

<sup>194</sup> *See* HOCHSCHILD, *supra* note 109, at 28. Hochschild did find some support for this explanation—as well as the explanations of "working scared" and of hostile or resistant supervisors blocking workers from taking advantage of policies—among the factory workers in her study. *See id.* at 197.

<sup>195</sup> *See id.* at 29. Workers in Hochschild's study denied being fearful of layoffs, and there were very few layoffs at this company during the time frame in which Hochschild was studying it. However, in 1995, the company "reengineered" itself and significantly downsized—in the process effectively eliminating the family-friendly policies that were the subject of Hochschild's study. *See id.* at 239–40.

<sup>196</sup> *See id.*

managers.<sup>197</sup> Alternatively, she theorized that women in male-dominated fields were attempting to avoid arousing the ire of their male coworkers by taking advantage of family-friendly policies; women in fields traditionally populated by women, however, proved no more likely than those in male-dominated environments to take advantage of the policies. And very few men across all fields utilized them.<sup>198</sup>

Hochschild concluded that working parents—particularly working mothers—preferred working in the labor market to spending time with their families.<sup>199</sup> For working mothers, home—the traditional sanctuary or haven of respite for male workers—had become work, and work—traditionally experienced by male workers as an alienating and inhuman jungle—had become home.<sup>200</sup> Part of this was attributable to the fact that husbands were not performing their share of the household work, so that women workers were returning home to a backlog of undone chores, a “second shift” of work for which they received no recognition and which they were expected to perform in isolation from other adults. By contrast, their labor market work offered a social life, an ongoing community of adults performing related work, and feelings of self-esteem based on the value and appreciation that they received for their market work.<sup>201</sup> Working fathers, on the other hand, feared losing their masculine identities as breadwinners; they confronted a deep taboo in even the most supportive workplace against revealing that their top priorities were family-oriented rather than market-oriented, and feared peer disapproval unless they matched or exceeded their wives’ investment of time in market work and income.<sup>202</sup> Understandably, then, working parents tended to spend more time in the realms where they perceived that their efforts were valued most, where they felt most competent and in control of their environments, and where they received the greatest levels of social and emotional support—at work.<sup>203</sup>

The dual-earner couples Hochschild studied had internalized market values

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<sup>197</sup> See *id.* at 29–32.

<sup>198</sup> See *id.* at 32–33.

<sup>199</sup> If correct, this finding represents a dramatic shift. Ten years ago, over half of mothers and almost two-thirds of fathers expressed a preference to spend time with their families, even if reducing work hours would mean foregoing income. See Moen & Dempster-McClain, *supra* note 193, at 588.

<sup>200</sup> See HOCHSCHILD, *supra* note 109, at 36–38.

<sup>201</sup> See *id.* at 38–41.

<sup>202</sup> See *id.* at 78–79, 97; see also Martin H. Malin, *Fathers and Paternal Leave*, 72 TEX. L. REV. 1046, 1064–79 (1994) (cataloguing reasons why men do not take advantage of paternal leave when it is available, and emphasizing the power of the cultural role of father as breadwinner and how it structures mens’ as well as women’s behavior).

<sup>203</sup> See HOCHSCHILD, *supra* note 109, at 198–201.

and were applying them to their family lives. For working parents, family time had taken on an “industrial’ tone,” conforming to “a cult of efficiency previously associated with the workplace.”<sup>204</sup> Time at home was “Taylorized”—subjected to principles of scientific management and standards of efficiency, and recalibrated to maximize productivity in the shortest period of time; “quality time” replaced quantity of time in a process of emotional downsizing.<sup>205</sup> Families engaged in domestic “outsourcing,” contracting out to others functions previously performed in the home by homemaking wives and mothers—cleaning, cooking, lawn care, education in the form of lessons in various crafts and skills, summer camp, and psychological counseling.<sup>206</sup> In short, family life had become commodified. Hochschild concluded, “[p]arents now . . . speak of time as if it were a threatened form, of personal capital they have no choice but to manage and invest, capital whose value seems to rise and fall according to forces beyond their control.”<sup>207</sup>

Hochschild characterized the phenomenon she identified as the reversal of the “emotional magnets” between work and home, rather than as a blurring of the boundaries between work and family or as evidence that the family is becoming infiltrated by market norms and values.<sup>208</sup> Yet there is every reason to

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<sup>204</sup> *Id.* at 45–46. The intrusion of market values into the home and family life means that the pace of family life is dictated by the marketplace and that every moment must be made to count in efficiency terms. *See* COONTZ, *supra* note 19, at 149.

<sup>205</sup> *See* HOCHSCHILD, *supra* note 109, at 48–50, 211–12, 220–21. This pattern of time compression and segmentation in turn created a “third shift” for working parents—time dedicated to noticing, understanding, and coping with children’s emotional responses to the compressed second shift. *See id.* at 215–18.

<sup>206</sup> *Id.* at 49–50. Indeed, entire new industries had prospered offering ready-made goods and services which substituted for those previously produced within the family, and marketing them to time-starved working women desperate for time-saving devices. *See id.* at 229–34. Such services included mail-order companies offering a week’s worth of flash-frozen dinners and breakfasts, team-housecleaning services such as Merry Maids, a service called Kids in Motion that transported children from school to after-school activities, Beck and Call, an errand-running service, handyman services, child playmate-matching services, a 1-900 number called “Grandma Please!” that put children in touch with an adult who would talk with them, sing to them, or assist with homework, services that organized children’s birthday parties, and even services that arranged family photos in albums. *See id.* at 230–32.

<sup>207</sup> *Id.* at 51.

<sup>208</sup> *See* HOCHSCHILD, *supra* note 109, at 44; *see also* Katharine Silbaugh, *The Polygamous Heart*, 1 THE GREEN BAG 97, 99 (2d ser. 1998) (reviewing ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997)). Although Hochschild intended her book as a critique of capitalism and the devaluation of parenting, it has been embraced by conservatives precisely because it reinforces the traditional notions of separation between home and work and between love and labor. *See id.* at 98–99.



suspect that what Hochschild was really documenting was the erosion of the gendered boundary between home and market and the intrusion of market values into the family.<sup>209</sup>

### C. Market Values vs. Family Values: Separate Worlds?

The family has been subject to market influences throughout history. Early in the 20th century, corporations tended to swallow the family and take over its functions, co-opting it into serving employment-related goals; as the paternalistic controllers of family functions as well as social life, employers established company towns, company housing, and initiated the trading of company scrip for food, clothing, and other necessities.<sup>210</sup> Corporate welfare programs explicitly utilized imagery of the company as a family.<sup>211</sup> Subsequently, corporations adopted a different strategy, drawing clear boundaries between work and home and disclaiming any responsibility for the family lives of workers. Hoping to neutralize family ties that potentially competed with loyalty to the employer, employers promoted the ideal that work and family life constituted nonoverlapping worlds.<sup>212</sup> The influx of women into the labor market during World War II forced employers to acknowledge that family life and employment were not separable aspects of working parents' lives, and the postwar shift to a postindustrial society, characterized by less loyal and more mobile workers,

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<sup>209</sup> The demise of the physical and cultural barriers which once divided the spheres of home and market has led to reframing "work-family conflict" as the challenge of work-family "integration." See Sue Shellenbarger, *Work & Family: Forget Juggling and Forget Walls; Now, It's Integration*, WALL ST. J., Feb. 18, 1998, at B1. Work-family integration refers to the gender-neutral process of making work and home seamless, eliminating all boundaries between the two with the aid of flexible work policies and technology. See *id.* The integration process is the logical outgrowth of the incorporation of market values into family life; it is fraught with peril in a culture that devalues the unwaged work of family caretaking. For example, despite the superficial appeal of telecommuting arrangements that allow parents to work from home, pressure on homeworkers to increase productivity in order to justify their physical absence from the workplace can lead to homeworkers spending more hours on paid work than before. See Sue Shellenbarger, *Work & Family: Families, Communities Can Benefit from Rise in Home-Based Work*, WALL ST. J., May 13, 1998, at B1. Physical presence at home does not necessarily equate to meaningful family involvement. See *id.*

<sup>210</sup> See ROSABETH MOSS KANTER, WORK AND FAMILY IN THE UNITED STATES: A CRITICAL REVIEW AND AGENDA FOR RESEARCH AND POLICY 11-12 (1977); see also *Marsh v. Alabama*, 326 U.S. 501, 502-03 (1946) (describing a "company town").

<sup>211</sup> See KANTER, *supra* note 210, at 11-12.

<sup>212</sup> See *id.* at 8-9.

placed pressure on corporations to consider family needs and allow them to shape corporate policy.<sup>213</sup>

With the demise of post-World War II economic prosperity and the end of the social contract between government, corporations, and workers, market values shifted away from permanence and group cohesiveness norms and toward impermanence and individualism. Instead of analogizing themselves to families and promising job security, lifetime employment, and retirement benefits in exchange for employee loyalty, employers encouraged employees to be independent, shifting the burden of career management onto the individual employee.<sup>214</sup> Employees responded by acting as individuals rather than team players, performing as entrepreneurial independent contractors and refusing to be absorbed into the work culture of the particular company.<sup>215</sup>

Workers' families were not untouched by this shift. The massive economic restructuring of the 1980s and 1990s produced "acute job insecurity," "unrelenting angst," marital strife, stress-related illness, and divorce.<sup>216</sup> Children raised on the values of loyalty and reciprocity came to see those teachings teaching as fairy tales after watching their parents suffer layoffs by a corporate entity that viewed loyalty as one-sided. Those who experienced the effects of economic upheaval in their families developed an entrepreneurial outlook, seeing themselves as free agents and accepting impermanence as the norm.<sup>217</sup> It should

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<sup>213</sup> See *id.* at 3; Carol Greenfield & Martha Terry, *Work/Life: From a Set of Programs to a Strategic Way of Management*, EMPLOYMENT REL. TODAY, Autumn 1995, at 67, 67-81; see also SHEILA B. KAMERMAN & ALFRED J. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE 187 (1987) (exploring whether employment policy and employer practices are becoming more responsive to the personal and family lives of employees, and analyzing the types of benefit programs being instituted).

<sup>214</sup> See N.R. Kleinfeld, *The Company as Family, No More*, N.Y. TIMES, Mar. 4, 1996, at A1. Another source summarizes employers' agenda during this period:

[E]mployers were singing the praises of the flexible employee, one less interested in fidelity to an organization than in acquiring the necessary skills to become a free agent on the open market. . . . Employers . . . wanted workers who would remain adaptable, who did not expect employment guarantees, and who were more "stress hardy."

*Tight Labor Markets, Low Unemployment Signal Shift in Employment Paradigm*, Daily Lab. Rep. (BNA) No. 202, at C-1 (Oct. 20, 1997) [hereinafter *Tight Labor Markets*].

<sup>215</sup> See Kleinfeld, *supra* note 214, at A8.

<sup>216</sup> See Uchitelle & Kleinfeld, *supra* note 184, at A26. Families in which one earner has lost a job and does not quickly find an equivalent one suffer a divorce rate 50% higher than the national average. See *id.*

<sup>217</sup> When the market shifted in the mid-1990s and a tight labor supply produced renewed employer interest in company loyalty and longevity of employment, employers and workers alike found it hard to shift gears:

not surprise us that these same workers accept impermanence in family relationships, are wary and reluctant to trust, and are more likely to see divorce as a solution than were the workers who reaped the benefits of the social contract of permanent, stable employment.<sup>218</sup>

While the time crunch is a significant factor for dual-earner working families, the picture Hochschild presents is incomplete. If the goal is to restore permanence to marriage and trust and loyalty to family relationships, it will not

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Employers are of two minds on today's employees, particularly younger workers. For example, . . . employers claim they want flexible and adaptable workers, but then wonder why these employees are so disloyal. Or, . . . business leaders want workers to be more entrepreneurial, but then they say of Generation Xers: "These people don't want to be told what to do."

*Tight Labor Markets*, *supra* note 214, at C-2; see also Kirk Johnson, *In the Class of '70, Wounded Winners*, N.Y. TIMES, Mar. 7, 1996, at A1 (describing the evolution of those who began working in the time when a social contract prevailed between employers and workers and are now being forced to adapt to a labor market characterized by impermanence); Joann S. Lublin & Joseph B. White, *Dilbert's Revenge: Throwing Off Angst, Workers Are Feeling in Control of Careers*, WALL ST. J., Sept. 11, 1997, at A1 ("Ten years ago someone with three jobs was a 'job hopper.' Today, someone who is 30 and has had 10 years with one company, you ask if they are too conservative.").

Employers' search for loyal employees may be misguided. Management professor Kenneth De Meuse, who defines loyalty as "staying together in good as well as bad times," believes that "the best labor and management can ask of each other today is commitment," which he defined as follows: "[A]s long as it remains beneficial to you and beneficial to me, we'll stay together." *Tight Labor Markets*, *supra* note 214, at C-2.

<sup>218</sup> See Rick Bragg, *More Than Money, They Miss the Pride a Good Job Brought*, N.Y. TIMES, Mar. 5, 1996, at A17 (describing the youngest brother in a family of aircraft manufacturer workers, who has a layoff notice in hand and is willing to move to find work—"he will chase work wherever it takes him;" married four times, he "has learned not to get attached to one particular house"); Sara Rimer, *A Hometown Feels Less Like Home: In the Community, Fraying Bonds*, N.Y. TIMES, Mar. 6, 1996, at A1 (describing the impact of economic upheaval upon people's expectations of security and stability, and warning that children's ability to develop long-term commitments and a sense of community are imperiled).

Perhaps even more significantly, the economic restructuring yielded a legacy of dispirited citizens who pull back from community involvement in exhaustion or frustration, shun long-term commitments, and display an individualistic ethos and a lack of connection with those in their communities. See Uchitelle & Kleinfeld, *supra* note 184. This phenomenon is probably best captured in Robert Putnam's now famous article *Bowling Alone*, which describes the decline in participation and membership in civic groups and social networks that are the critical foundation for a representative democracy, including religious organizations, labor unions, parent-teacher associations, fraternal organizations like the Lions, Elks, Shriners, and Jaycees, and most whimsically, bowling leagues. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995) (arguing that the decline in turnout in national elections over the last three decades is correlated with a decline in the number of citizens directly engaged in civic involvement beyond politics and government).

be enough simply to reduce time spent at work and increase time spent in the "haven" of home. Instead, there must be explicit recognition of the linkage between the values privileged in paid employment and those that structure family relationships. In short, it is the values and structure of paid work rather than the family values and structure of families that should be adjusted so that employment accommodates the life patterns of workers who are also husbands, wives, parents, and caregivers.

#### *D. Restructuring Paid Labor to Fit the New Gender Order: A Blueprint*

If tensions arising out of work-family conflict and shifting gender roles are significant contributing factors to marital discord, and if the goal is reduction of the divorce rate, why not question the failure of law to restructure paid work to more closely fit the realities of the new dual-earner marriage? Perhaps the decline in marital permanence exists "not because we've changed too much but because we haven't changed enough."<sup>219</sup>

To be sure, there are risks inherent in adjusting the structure of paid work to accommodate family obligations. Chief among these is the fear that gender roles will become entrenched if only women take advantage of new workplace accommodations to family life,<sup>220</sup> while at the same time surrendering what little economic power they presently possess.<sup>221</sup> For example, part-time or reduced work strategies that are primarily pursued by women run the risk of devaluing the paid work because of who is doing it, as well as risking entrenching the unequal division of homework and caretaking work between men and women.<sup>222</sup> Gendered patterns of division of household labor persist even when

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<sup>219</sup> COONTZ, *supra* note 128, at 109.

<sup>220</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 47-48 (describing one woman's decision to arrange a half-time schedule for her paid work that enabled her to rationalize doing more of the second shift work at home).

<sup>221</sup> See *id.* at 90-91 (describing the ways in which one formerly full-time overachieving mother was punished by her company when she took advantage of a family-friendly corporate policy allowing part-time work at part-time pay: Questions about her commitment to her career were raised, she was effectively demoted, and key benefits were cut).

<sup>222</sup> Because most part-time workers today are female, there is a risk that part-time work itself will be devalued, regardless of the gender of the person who performs it. See generally CHRIS TILLY, *HALF A JOB: BAD AND GOOD PART-TIME JOBS IN A CHANGING LABOR MARKET* (1996) (examining correlation between pay, benefits, and number of hours worked per week). Further, there is a significant risk that increasing opportunities for reduced work will "reinforce unequal gender relations rather than challenge them," by entrenching the unequal division of homework and caretaking work between men and women. CYNTHIA NEGREY, *GENDER, TIME, AND REDUCED WORK* 1-2 (1993); see also JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 151 (1991) (noting that such solutions run the risk of

worktime reduction does occur. Indeed, it might be argued that the gendered division of labor determines the availability of time, not vice versa.<sup>223</sup> The little research done on the subject indicates that where the male earner in a couple is employed full-time while his female partner is employed part-time, wives use less-than-full-time market employment to accommodate their household and caregiving responsibilities, while husbands' less-than-full-time market-employment does not significantly alter the nature of the gender division of labor in the household.<sup>224</sup> In addition, at existing compensation levels most parents cannot afford to work part-time unless they are subsidized by a spouse's full-time income—which renders part-time workers economically dependent upon spouses and altogether deprives single parents of the opportunity to work part-time.<sup>225</sup>

If paid labor is to be restructured in an equality-supporting direction, a more radical rethinking is necessary. Feminists have proposed three alternative visions of how paid work might be restructured to support the new gender order. I present them below in order of increasing desirability.

### 1. *The Universal Breadwinner Model*

The "Universal Breadwinner" model seeks to degender the breadwinning role so that women can support their families through their own waged work. This is essentially the model that U.S. policy has followed; Western European nations have pursued it more aggressively. Women's market employment is affirmatively promoted through state provision of caretaking services traditionally performed by women, such as day care and elder care. Overt barriers to equal opportunity for women in the market are removed, such as sex discrimination, pay inequity, and sexual harassment.<sup>226</sup>

Although the Universal Breadwinner model would do much to reduce poverty and exploitation of women and to narrow the gender wage gap, it is flawed in its assumption that all domestic labor and carework could (or should) be transferred to the market and state. The notion that tasks of and for the body should be isolated from other work and transferred to those who will "specialize" in such tasks reinforces hierarchies that privilege those who do the work of the

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reproducing gender inequality unless women's roles change within the family).

<sup>223</sup> See NEGREY, *supra* note 222, at 10 n.14.

<sup>224</sup> See *id.* at 27.

<sup>225</sup> See *id.* at 3. Part-time workers earn approximately 60% of the hourly wages of full-time workers. See *id.* at 43. Seventy-five percent of year-round part-time workers receive no health insurance, and 88% who work less than a full year have no health insurance. See *id.* Fewer than 20% of part-time workers are covered by pension programs. See *id.* at 44.

<sup>226</sup> See FRASER, *supra* note 177, at 43, 51–52.

mind over those who do work of and for the body. Who, exactly, will perform such tasks, and how well will they be compensated? Historically, women of color have borne the brunt of such work transfers.<sup>227</sup> A "Universal" Breadwinner model that enables only the most economically privileged women to support themselves and their families is grossly deficient.

Further, the Universal Breadwinner model valorizes paid labor by placing a premium on breadwinner status which implicitly devalues unpaid caretaking and homemaking work, providing more incentive to avoid it.<sup>228</sup> Yet all carework could not be transferred out of the family unless we were prepared to accept collective living arrangements, which seems unlikely.<sup>229</sup> Thus, unless men could be induced to do an equal share of domestic work, employed married women would still work a second shift. In short, the Universal Breadwinner model is androcentric: It privileges men's traditional sphere, paid employment, and does nothing to accord social value to women's traditional work, carework. The breadwinner in this system is nominally gender-neutral but still implicitly masculine.<sup>230</sup> Ultimately, it would make women's life patterns look more like those of men.

## 2. *The Caregiver Parity Model*

The second feminist-inspired model, the "Caregiver Parity" model aims to "make difference costless"<sup>231</sup> by keeping the bulk of caregiving work in the family but supporting it with public funds.<sup>232</sup> It would afford women a choice between supporting themselves and their families through carework or a combination of carework and part-time market employment, or through full-time market employment.<sup>233</sup> The model would necessitate governmental caregiver allowances to compensate childbearing, parenting, and housework at levels equivalent to a breadwinner wage; mandated pregnancy and family leaves to facilitate caregivers' exit and re-entry into the labor market without loss of job security and seniority; mandated flextime; and expansion of social insurance

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<sup>227</sup> See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 126-28 (1988).

<sup>228</sup> See FRASER, *supra* note 177, at 54.

<sup>229</sup> See *id.* at 53-54. But see ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 222 (1981) (proposing the incorporation of household tasks into the industrial economy).

<sup>230</sup> See FRASER, *supra* note 177, at 54-55.

<sup>231</sup> *Id.* at 55 (quoting Christine A. Littleton, *Reconstructing Sexual Equality*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 35, 40 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991)).

<sup>232</sup> See *id.* at 56.

<sup>233</sup> See *id.* at 43.

programs such as health, unemployment, disability, and retirement insurance that are currently linked to paid employment.<sup>234</sup>

Unlike the Universal Breadwinner model, the Caregiver Parity model elevates caregiving work to a parity with paid labor, combating androcentrism.<sup>235</sup> However, caregiver parity runs the risk of institutionalizing a “mommy track” in employment: By creating a market in flexible, contingent, low-paying full or part-time jobs, it encourages couples to keep one partner on the breadwinner track and to relegate the other to the caregiver track, rather than to alternate or share carework. Such an arrangement institutionalizes the gendered division of labor.<sup>236</sup> Further, while women could avoid the double shift by mixing carework and paid labor, the decision to do so would not be costless; thus, some would choose not to forego the advantages of the breadwinner track, and would still work a double shift, while those without partners would be doubly disadvantaged.<sup>237</sup> Thus, the effect of this reform would be to leave men’s and women’s life patterns relatively unchanged.

### 3. *The Universal Caregiver Model*

A third possibility, the “Universal Caregiver” model, would seek to redesign institutions around women’s life patterns so that men as well as women would be encouraged to combine breadwinning with caregiving.<sup>238</sup> Paid employment would be structured around the assumption that workers are caregivers as well as breadwinners; all would enjoy a shorter work week, and all would have the support of employment-enabling government services. Carework performed within the family would be publicly supported.<sup>239</sup> The goal of the Universal Caregiver model is to dismantle the dichotomy between breadwinner and caregiver and degender the roles.<sup>240</sup> In this vision, the postindustrial order would revolve around “a social world in which citizens’ lives integrate wage earning, caregiving, community activism, political participation, and involvement in the associational life of civil society. . . .”<sup>241</sup>

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<sup>234</sup> See *id.* at 56.

<sup>235</sup> See *id.* at 55–56, 58.

<sup>236</sup> See *id.* at 57.

<sup>237</sup> See *id.* at 58.

<sup>238</sup> See *id.* at 61.

<sup>239</sup> See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> *Id.* at 62.

Nancy Dowd has argued persuasively for implementation of a Universal Caregiver model by focusing on the situation of single-parent families. See DOWD, *supra* note 74, at xxii. The dilemmas faced by single-parent families epitomize those of the working parent and analysis of

#### 4. *Summary*

Work law plays a critical role in structuring paid labor and in replicating a gendered division of labor, which is incompatible with norms of gender equality and no longer functional in a postindustrial world. Instead of remaining "the precondition and subordinate appendage of male wage labour" that it has historically been in industrial society, women's labor in and outside the family must be accorded value and itself considered productive.<sup>242</sup> Thus, a viable reform should shed the idea that workers need to be relieved of domestic tasks because these tasks, typically associated with women, are viewed as degrading, unproductive, and valueless.<sup>243</sup> Instead, we must assume that all waged workers will also perform necessary domestic and caretaking tasks, and promote a sharing of such tasks among all persons, inside and outside the home.<sup>244</sup>

#### V. RESTRUCTURING PAID EMPLOYMENT

There is a heavy bias in the U.S. labor market in favor of standard work patterns: full-time, year-round employment. Conforming to such a work arrangement is seen as evidence of commitment to one's paid work or career. A central assumption supporting this bias is that quantity of worktime is directly correlated with quantity and quality of work output.<sup>245</sup> An additional assumption that structures standard work arrangements is that work and family must be maintained as separate domains, with work as the primary commitment for all full-time employees. Clearly, these assumptions are predicated on the further assumption that the dominant family structure is a male breadwinner/female homemaker model.

Researchers have begun to question the continuing validity of these assumptions, arguing that particularly with regard to the less routinized work

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them often reveals gendered norms that are obscured by focusing on a two-parent family. *See id.* at xix. A focus on single-parent families need not necessarily entail destabilizing the two-parent family or undermining the role of fathers, as many conservative commentators seem to fear. *See id.*; *see generally* Blankenhorn, *supra* note 138.

<sup>242</sup> *See* ANDRE GORZ, *FAREWELL TO THE WORKING CLASS: AN ESSAY ON POST-INDUSTRIAL SOCIALISM* 5-6 (Michael Sonenscher trans., 1982).

<sup>243</sup> *See id.* at 6. In situations where it is desirable to contract out some parts of domestic or caretaking responsibilities, as in elder care and some child care, this type of reform would also help to insure that those working for wages in such endeavors would not suffer underpayment because of the lack of value associated with such tasks. *See id.*

<sup>244</sup> *See id.*

<sup>245</sup> *See* Phyllis Hutton Raabe, *Constructing Pluralistic Work and Career Arrangements*, in *THE WORK-FAMILY CHALLENGE: RETHINKING EMPLOYMENT* 128, 131 (Suzan Lewis & Jeremy Lewis eds., 1996).



characteristic of a postindustrial economy, quality of worktime and an integrated work/life approach to work problems are more important to productivity than quantity of time.<sup>246</sup> At the same time, a few commentators have pointed to the potential of reduced worktime as an issue that might mobilize workers across class and gender lines and lead to a significant restructuring of work. In this Part, I present some of the research that challenges the assumptions currently constraining us to a Universal Breadwinner model, and suggest some possible reforms that might move us toward a Universal Caregiver model.

### A. *Worktime*

Americans have long subscribed to the Puritan work ethic that working long, hard hours is essential to a virtuous existence. Despite the steady influx of books and seminars on time and its relationship to productivity that tell us that it is how time is allocated and planned rather than sheer volume of time spent that fosters productivity,<sup>247</sup> American employers and employment policy continue to reward quantity of worktime. In a well-publicized book, Juliet Schor has argued that American workers' work hours have been steadily increasing since the late 1960s without public acknowledgement or discussion of the fact; the average American worker now works an additional 163 hours per year, or the equivalent of an extra month per year over the number of hours worked in 1969.<sup>248</sup> This

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<sup>246</sup> See *id.* at 131–32.

<sup>247</sup> See, e.g., STEPHEN R. COVEY, ET AL., *FIRST THINGS FIRST: TO LIVE, TO LOVE, TO LEAVE A LEGACY* (1994); HYRUM W. SMITH, *THE 10 NATURAL LAWS OF SUCCESSFUL TIME AND LIFE MANAGEMENT: PROVEN STRATEGIES FOR INCREASED PRODUCTIVITY AND INNER PEACE* (1994).

<sup>248</sup> See SCHOR, *supra* note 222, at 29. Schor reports that the extra weekly hours derive primarily from employee moonlighting—holding more than one job at a time in order to meet financial obligations (prevalent among women workers), and working more overtime (particularly among manufacturing workers). See *id.* at 31–32. Weekly hours have risen modestly since Schor's 1989 book, from 43.7 in 1989 to 43.8 hours per week for the average full-time worker in April 1994. See Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 159 (1994).

Schor's research has not gone unchallenged. In 1997, John Robinson and Geoffrey Godbey published a book called *TIME FOR LIFE*, which asserted that Americans were working 2.8 hours less per week or 140 hours less per year (assuming a 50-week work year). See JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* 81 (1997); see also Sue Shellenbarger, *Do We Work More or Not? Either Way, We Feel Frazzled*, WALL ST. J., July 30, 1997, at B1. While most economists agree with Schor that there is a trend toward higher numbers of annual hours worked, Robinson and Godbey suggest that Schor's analysis misses the fact that personal activities have become more and more integrated with worktime, so that people are actually working less when they are at work. See *id.*

effect is compounded for dual-earner families: The increase in the number of married women in the labor force means that the average American couple works ten hours more per week than did the average couple in 1970.<sup>249</sup>

### 1. *Law and Worktime Norms*

#### a. *The Fair Labor Standards Act*

Employment law statutes establish norms for full-time work. The Fair Labor Standards Act's (FLSA)<sup>250</sup> forty-hour work week and eight-hour-per-day norm validate a culture in which "real" jobs are defined as full-time jobs. Although the FLSA covers only about sixty percent of all wage and salary workers, its impact on social norms regarding worktime is reflected in the fact that roughly two-thirds of those employed full-time report that they work exactly forty hours per week and almost four-fifths of those employed full-time work a five-day work week.<sup>251</sup>

The FLSA was designed to spread available work over a larger number of workers by establishing a forty-hour work week norm and imposing a financial penalty on employers who required employees to work more than forty hours per week: Time and one-half pay at the employee's "regular rate" was owed for hours worked over forty in a single week. The FLSA's penalty has proven ineffective as a deterrent to overtime.<sup>252</sup> Overtime hours in manufacturing are at record levels, and employers are increasingly adjusting to market fluctuations by

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Still others assert that the length of the average work week has neither increased or decreased significantly over the last 30 years, but that the percentages of those working both longer and shorter work weeks than the 40-hour norm has shifted substantially. Thus, the average work week figure cloaks some important changes. See Jerry A. Jacobs & Kathleen Gerson, *Rethinking Law in the Twenty-First Century Workplace: Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMPLOYMENT L. 457, 458 (1998).

<sup>249</sup> See Jacobs & Gerson, *supra* note 248, at 459.

<sup>250</sup> The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1994).

<sup>251</sup> See NEGREY, *supra* note 225, at 20 (reporting figures from the mid-1980s which were virtually unchanged since 1973, when the Current Population Survey began monitoring hours worked on principal jobs). But see Jacobs & Gerson, *supra* note 248, at 458 (asserting that only 40% of Americans work 40 hours per week).

<sup>252</sup> See SCHOR, *supra* note 222, at 66–67 (arguing that institutional structures in the law regulating employment tend to encourage the use of overtime rather than additional hiring, particularly where the cost of fringe benefits represents a significant percentage of the wage rate). Although the FLSA's "time-and-a-half" rate for overtime was intended to install a 40-hour week, in reality the financial disincentive that it provided to employers for a longer work week functioned as an incentive for employees to work as many hours as possible, and leisure was contracted rather than expanded. See *id.* at 141.

increasing hours rather than by hiring new workers.<sup>253</sup> Indeed, overtime pay for employees is often the most cost-effective strategy for employers, avoiding the need to hire, train, and provide benefits for new employees, and preserving flexibility for the employer.<sup>254</sup> Thus, employers have an incentive either to hire fewer workers and instead work relatively well-paid full-time employees longer hours, or to eliminate full-time positions to the extent possible and replace them with a larger number of lower-paid part-time employees (some of whom may actually log more than forty hours per week but who are paid as part-timers).<sup>255</sup>

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<sup>253</sup> See Daniel J. Roy, *Despite Record Overtime Levels Factories Keep Lid on Hiring*, Daily Lab. Rep. (BNA) No. 120, at C-1 (June 23, 1997) (while historically manufacturers have shifted from the use of overtime to meet increased demand to hiring additional workers once the need for more man-hours has stabilized, the present economic expansion has not followed this pattern; despite widespread overtime in manufacturing at the highest levels since World War II, manufacturers have chosen to continue to utilize overtime rather than expanding their payrolls); Lonnie Golden, *Timing Is Everything: Potential Economic Repercussions of Proposed "Flextime" Reforms to the FLSA Overtime Hours Law*, 48 LAB. L.J. 504, 506 (1997); Schor, *supra* note 248, at 159 (reporting that manufacturing overtime was at its highest recorded level of 4.8 hours per week in April of 1994).

<sup>254</sup> See Christopher L. Martin, et al., *The Fair Labor Standards Act and the Fluctuating Workweek Scheme: Competitive Compensation Strategy or Worker Exploitation?*, 44 LAB. L.J. 92, 93 (1993). The costs of training new workers and providing fringe benefits have risen as a percent of salaries and wages from 17% in 1955 to 36% in 1987. See SCHOR, *supra* note 222, at 67. Fringe benefits are paid per-person and attach to full-time jobs rather than being payable by the hour.

What lawful role the cost of providing benefits may play in an employer's decision to reorganize work, outsource work, subcontract it, or hire temporary workers to do it remains an unanswered question. The Supreme Court has intimated that the Employee Retirement Income Security Act (ERISA) imposes some limits, but the extent of these limits is as yet undetermined. See *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997) (finding that section 510 of ERISA, which prohibits employers from firing workers to reduce benefits, applies to nonvested as well as vested benefits, and reinstating a lawsuit filed on behalf of 200 former employees of Santa Fe Terminal Services who alleged that the company illegally deprived them of their rights to pension and other benefits when it contracted out their work).

<sup>255</sup> See Pam Ginsbach, *Use of Part-time Workers at UPS Underscores Thorny Workplace Issue*, Daily Lab. Rep. (BNA) No. 153, at B-1, B-2 (Aug. 8, 1997) (exploring incentives for UPS to utilize a two-tiered employment structure and to increase the percentage of part-time workers rather than hire new full-time workers, since part-time workers earn a lower per-hour wage and do not receive full fringe benefits); Douglas A. Blackman, et al., *UPS Faces Huge Rise in Annual Labor Costs*, WALL ST. J., Aug. 20, 1997, at A3, A6 (explaining that the 57% of the UPS workforce who worked part-time average only slightly more than half the hourly rate of full-time workers—\$11 per hour compared to \$20.01 per hour—prior to the Teamsters' strike; the pay differential between the two tiers was reduced in the strike settlement, but only slightly).

*b. Case Law*

The common law has proved equally ineffective in constraining overtime hours. Overtime requirements need not yield to family obligations at law. The Massachusetts Supreme Judicial Court recently affirmed an employee's termination for refusing to work overtime, even though the refusal was based upon her need to attend to family caretaking obligations.<sup>256</sup> Joanna Upton, a single mother, was told during her hiring interview in April of 1991 that her hours of employment would be from 8:15 A.M. to 5:30 P.M. with one or two late nights per month. Upton accepted the job on this condition, and made arrangements for child care based upon that information. From the beginning, however, she was required to work until 6:30 or 7:00 P.M. at night, and sometimes later. In July of 1991, she was told that she would have to work until 9:00 or 10:00 P.M. each evening and all day Saturday for several months. Upton refused based upon her child caretaking obligations and was discharged two weeks later.

In Upton's action for wrongful discharge in violation of public policy, the court approved a grant of summary judgment in the employer's favor, finding no state public policy favoring the care and protection of children sufficient to justify an exception to the at-will employment rule.<sup>257</sup> The court rejected Upton's argument that a state unemployment compensation law providing compensation to persons whose availability to work is limited by domestic responsibilities was sufficient proof of public policy to override the at-will employment rule. The court explained:

There is no clearly established public policy which requires employers to refrain from demanding that their adult employees work long hours. Nor is any public policy directly served by an employee's refusal to work long hours. . . . Nor has any court to our knowledge allowed recovery against an employer who terminated an at-will employee who refused to work newly imposed hours due to an irreconcilable conflict between her new work schedule and the obligations of parenting . . . . We sympathize with the difficulties of persons in the position of the plaintiff who face the challenge of reconciling parental responsibilities with the demands of employment. However, employer liability under common-law principles is not an appropriate means of addressing the problem in the at-will context.<sup>258</sup>

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<sup>256</sup> Upton v. JWP Businessland, 682 N.E. 2d 1357 (Mass. 1997).

<sup>257</sup> See *id.* at 1360.

<sup>258</sup> *Id.* at 1359-60. Courts have reached different conclusions in the analogous area of unemployment compensation. Where an employer alters work hours in such a way that the employee can no longer fulfill her domestic responsibilities, several courts have found that the

## 2. The Union Role

Historically, unions were the major force advocating shorter work hours for employees. Demands for shorter hours have characterized the most dynamic periods in organized labor's history. In the 1780s, unionized male artisans and craftsmen successfully fought for a ten-hour day, which at the time must have seemed like an impossible dream.<sup>259</sup> Female textile workers joined the struggle in the mid-1840s.<sup>260</sup> Following the Civil War, organized labor sought an eight-hour day, and explicitly tied this request to a demand for higher pay and a family wage.<sup>261</sup> By the late 1800s, increasing numbers of women in the paid labor force and the growth of the first wave of feminism made women the most innovative

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worker who quits is entitled to unemployment compensation because the decision to quit is involuntary. *See* Zukoski v. Director, Div. of Employment Sec., 459 N.E.2d 467, 468 (Mass. 1984) (recognizing that plaintiff's domestic responsibilities may permit him to reject some employment situations "rendering his termination involuntary and making him eligible for benefits."); *Manias v. Director, Div. of Employment Sec.*, 445 N.E. 2d 1068 (Mass. 1983) (finding that claimant's decision to quit was involuntary where she left work due to a reduction in hours and conflict with child care demands); *Truitt v. Unemployment Compensation Bd. of Review*, 589 A. 2d 208, 210 (Pa. 1991) (ruling that claimant's difficulties in finding evening child care produced "real and substantial pressure" on her to terminate her employment). Some courts have held in similar cases that employees who quit their jobs were entitled to unemployment benefits because there was good cause for leaving attributable to the employer. *See* Newland v. Job Serv. N.D., 460 N.W. 2d 118, 124 (N.D. 1990) (holding that a "substantial shift change" which prevents an employee from obtaining child care and forces her to quit entitles that employee to unemployment benefits because she is "not unemployed through fault of her own"). However, many courts still adhere to a traditional analysis in which family care obligations are defined as personal and therefore voluntary reasons for quitting job. *See, e.g.*, *Beard v. State Dep't of Commerce*, 369 So. 2d 382, 385 (Fla. Dist. Ct. App. 1979) (holding that a shift change which prevents an employee from obtaining child care and forces her to quit does not entitle that employee to unemployment benefits because the shift change "is not good cause which can be attributable to her employer"); *Aladdin Industries, Inc. v. Scott*, 407 S.W. 2d 161, 163 (Tenn. 1966) (denying claimant's application for benefits and holding that a shift change to night hours that prevented the claimant from meeting her child caretaking obligations and forced her to quit did not constitute "good cause" for termination of her employment). *See generally* Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081, 1081-87 (1992) (arguing that women are disadvantaged in an unemployment insurance system predicated on the assumption that the typical worker is a male breadwinner without significant caretaking responsibilities).

<sup>259</sup> *See* SCHOR, *supra* note 222, at 72.

<sup>260</sup> *See id.* at 72; DAVID R. ROEDIGER & PHILLIP S. FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY* 43-79 (1989).

<sup>261</sup> *See* SCHOR, *supra* note 222, at 73. *See generally* ROEDIGER & FONER, *supra* note 260, at 81-100.

and committed advocates of shorter hours.<sup>262</sup>

The Depression triggered another push for hours reduction. In the 1930s, the AFL sought a legislated thirty-hour week, relying on arguments that stressed reducing unemployment by sharing available work and increasing productivity.<sup>263</sup> Business resisted this proposal strenuously on the basis that it was unconstitutional and impractical. Business owners worried that full employment would deprive them of their market leverage over workers and increase labor costs.<sup>264</sup> The proposal ultimately failed. Instead, the Fair Labor Standards Act was passed in 1938, setting minimum wages and promoting a forty-hour work week through overtime penalty provisions for hours worked in excess of forty per week.<sup>265</sup>

Subsequently, labor abandoned the fight, in part because it lacked a positive, compelling rationale for the hours reduction (because it was predicated on a defensive "spread-the-jobs" justification, the support for the thirty-hour work week faded when the labor market recovered during World War II).<sup>266</sup> As labor increasingly accepted the capitalistic system and adopted an economic agenda that sought to obtain a larger part of the spoils for union members, it became less and less interested in obtaining a shorter work week and more interested in obtaining higher overtime premiums and better hourly wages.<sup>267</sup> Thus, within the labor movement, the historical goal of shorter hours has receded in priority. Concerns about preserving jobs and income, as well as securing regulated and predictable allocation of hours, have risen to the forefront.<sup>268</sup>

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<sup>262</sup> See ROEDIGER & FONER, *supra* note 262, at 145. Unfortunately, the AFL's resistance to organizing women and its commitment to a traditional gender order in which women did not compete with men in the waged labor market undermined the potential for a feminist-labor coalition and hobbled the AFL in its struggle for reduced hours. *See id.* at 145, 163-65; *see also* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1161-66 (1991) (examining AFL reluctance to organize working women).

<sup>263</sup> See ROEDIGER & FONER, *supra* note 260, at 245-47.

<sup>264</sup> See SCHOR, *supra* note 222, at 74-75; ROEDIGER & FONER, *supra* note 260, at 248-49.

<sup>265</sup> See ROEDIGER & FONER, *supra* note 260, at 255-56.

<sup>266</sup> See SCHOR, *supra* note 222, at 77-78.

<sup>267</sup> *See id.* at 78. Schor observes that these priorities were supported by male unionists. Female unionists placed shorter work hours at the top of their agenda, but their voices were drowned out in the male-dominated labor movement. *See id.*

<sup>268</sup> *See* Golden, *supra* note 253, at 507 n.15. Recently, however, unions have shown significant interest in the issue of "mandatory overtime." One labor consultant predicted that mandatory overtime would become one of the "hottest button issues" in 1999, as unions begin to resist such employer practices at the bargaining table. *See* Michelle Amber & Elizabeth Walpole-Hofmeister, *Rising Health Costs, Competition Seen Influencing 1999*

As union influence has declined, wages have failed to keep pace with inflation. The frequent use of overtime functions as an incentive for employers to effectively reduce base wages in order to accommodate predicted labor costs that include overtime at premium rates.<sup>269</sup> Employers simultaneously raise the prices of their products without increasing the wages of their workers proportionately, in turn increasing the pressure on employees to work extra hours in order to maintain the standard of living that they enjoyed in the past.<sup>270</sup> Lacking both “a culture of resistance to long hours or a political movement to press for government reforms,” nonunion workers are powerless to block these incursions on their time, and they are likely to continue.<sup>271</sup>

### 3. *The Case for Reducing Worktime*

The aspect of rising work hours that has been most visible to public view has been occasioned by women’s growing participation in the waged labor force. Because of women’s traditional responsibility for homemaking and family care, rising work hours have created “role overload” or “work-family conflict” that is

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*Bargaining*, Daily Lab. Rep. (BNA) No. 250, at C-1 (Dec. 31, 1998). That prediction proved to be accurate: Mandatory overtime was an important issue for workers because it deprived them of control over their lives and prevented them from spending time with their families. See Jeff Florian, *Reduction, Elimination of Mandatory Overtime Gains Prominence as Negotiating Issue*, Daily Lab. Rep. (BNA) No. 143, at C-1 (July 27, 1999). In recent years, unions have successfully organized and mobilized workers in widely disparate occupations around the issue of overtime work. See Michael L. Smith, *Mandatory Overtime and Quality of Life in the 1990s*, 21 IOWA J. CORP. L. 599, 601 (1996) (describing worker discontent and strikes over excessive overtime requirements at a number of manufacturers’ plants); *CWA Strikes US West in 14 States over Complaints of ‘Forced’ Overtime*, Daily Lab. Rep. (BNA) No. 159, at AA-1 (Aug. 18, 1998) (describing union strike over mandatory overtime); Leah Samuel, *Workers at SONY Compact Disc Plant Tired of 10-Hour Days with No Overtime Pay*, LAB. NOTES, July 1997, at 4 (describing impetus for union organizing drive at a manufacturing plant as deriving in part from workers’ desire for shorter work days); Peter T. Kilborn, *Overtime Is Money, But GM Assembly Workers Say They’ve Had Enough*, N.Y. TIMES, Nov. 22, 1994, at A16 (reporting that GM requires its workers to work 10 hours per week beyond the conventional 40, and strongly encourages them to work even more overtime voluntarily; ultimately, the workers’ anger at the amount of overtime demanded by the company and the company’s refusal to hire new workers resulted in a vote to strike); Erin Small, *Movie Workers Demand 14-Hour Limit on Work Days*, LAB. NOTES, July 1997, at 7 (discussing union campaign to limit the work day for motion picture workers that was prompted by the tragic death of a crew worker who fell asleep while driving home following a 19-hour day).

<sup>269</sup> See Schor, *supra* note 248, at 164.

<sup>270</sup> See *supra* notes 253–255 and accompanying text. Schor found that production and nonsupervisory employees (who comprise 80% of the workforce) must now work 245 more hours per year to maintain their 1973 standard of living. See SCHOR, *supra* note 222, at 81.

<sup>271</sup> See SCHOR, *supra* note 222, at 81.

typically characterized as a women's issue.<sup>272</sup>

In fact, however, it is the increase in the number of dual-earner couples and the demise of the male breadwinner/female homemaker marriage that are responsible for the time pressure that most American workers experience.<sup>273</sup> Schor makes a cogent argument that rising work hours are a concern for all workers in capitalist economies, because their incentive structures contain biases toward long working hours. Leisure exists in spite of capitalism and is reined in only by active efforts of trade unions and social reformers.<sup>274</sup> Increased work hour requirements are associated with increased unemployment, underemployment, and a growth in income disparity.<sup>275</sup>

A variety of social problems can be traced to work overload. Stress and illness affect overtired persons more dramatically than they affect those who are well-rested, and there has been a corresponding rise in stress-related accidents and illnesses at work, and workers' compensation claims related to stress.<sup>276</sup> Many workers complain of sleep deficits, particularly women employed in the labor market with children at home.<sup>277</sup> This stress has slopped over into the marital realm, causing a reduction in marital satisfaction and conflicts over the

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<sup>272</sup> See SCHOR, *supra* note 222, at 5. Schor's data suggests, however, that men as well as women are putting in longer hours on the job, and this includes parents of young children: Thirty percent of fathers with children under 14 work 50 or more hours per week, and the same percentage work regularly on weekends. *See id.* at 21; *see also* Jacobs & Gerson, *supra* note 248, at 458 (reporting that 25.2% of men and 10.8% of women work at least 50 hours per week).

<sup>273</sup> See Jacobs & Gerson, *supra* note 248, at 459-60.

<sup>274</sup> See SCHOR, *supra* note 222, at 7, 39. Similarly, French social critic Andre Gorz asserts that the rise in worktime has occurred not because workers have preferred more money to more time, but because employers have fiercely resisted the reduction of working hours, preferring higher unemployment to broader employment with more leisure because high unemployment rates function as a disciplinary force, reserving scarce jobs for the most hard-working and compliant. *See* GORZ, *supra* note 242, at 134-36. Others argue that the increase in work hours is the result of sophisticated advertising and marketing campaigns that stimulate demand and lead workers voluntarily to work longer hours. *See* David George, *Working Longer Hours: Pressure from the Boss or Pressure from the Marketers?*, 15 REV. SOC. ECON. 33 (1997).

<sup>275</sup> See SCHOR, *supra* note 222, at 39-40.

<sup>276</sup> *See id.* at 11; Kilborn, *supra* note 268, at A16.

<sup>277</sup> See HOCHSCHILD & MACHUNG, *supra* note 162, at 9; SCHOR, *supra* note 222, at 11. Hochschild described the women in her study as obsessed with the topic of sleep, talking about sleep and their need for it "the way a hungry person talks about food." *Id.* Sleep deprivation costs Americans billions of dollars in lost productivity, absenteeism, and accidental injuries at work. *See* Simon J. Nadel, *National Sleep Foundation Releases Study on \$1 Billion Sleep Deprivation Problem*, Daily Lab. Rep. (BNA) No. 58, at A-5 (Mar. 26, 1998).



division of household labor that are exacerbated by time scarcity.<sup>278</sup> Further, lack of time inevitably creates a "parenting deficit" as parents spend less time with their children and are more tired when they are available to be with their children.<sup>279</sup>

Reducing worktime would thus alleviate work-family conflict to some degree and reduce the impact of the deficit of adequate day care. Further, restructuring paid work to normalize reduced market work could also assist in solving social problems stemming from labor market structure, such as worker displacement and unemployment, while simultaneously increasing civic engagement and community involvement.<sup>280</sup> Burgeoning social problems that require attention from Americans through unpaid or volunteer work in the home and in the community—including involvement in our children's' educational process, re-education and retraining of ourselves to take advantage of new technology, and charity work—all militate for a reduction in paid work hours.<sup>281</sup> Once done by women, much of the unpaid social labor that benefits society—volunteering in civic community groups, caring for the sick, and the elderly—now simply goes undone.<sup>282</sup>

Moreover, there is some evidence that shorter work weeks raise productivity because they enhance morale and output, resulting in a higher pace of work, fewer sick days, lower absenteeism, and less personal business conducted on company time.<sup>283</sup> Indeed, the American historical experience is that reduction in

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<sup>278</sup> See BLUMSTEIN & SCHWARTZ, *supra* note 118, at 146–50 (tension over the division of labor in a household is a contributing source of marital conflict); HOCHSCHILD & MACHUNG, *supra* note 162, at 212; SCHOR, *supra* note 222, at 12.

<sup>279</sup> See SCHOR, *supra* note 222, at 12–13.

<sup>280</sup> See NEGREY, *supra* note 222, at 10–11.

<sup>281</sup> See NEGREY, *supra* note 222, at 121. Fred Best has argued that the current linear and inflexible life-stage progression structure of work is ill-suited to a postindustrial society. Traditionally, we have divided life into three time segments: youth for education, maturity for work and child-rearing, and older age for retirement. This structure is poorly suited to a postindustrial society featuring increased life expectancy, changing patterns of family life (more women in the workforce), and multiple jobs or even careers over each person's lifespan. Best suggests that a linear progression in which work is compressed into mid-life years impairs productivity as well as undermining parenting: He proposes reducing worktime in mid-life in order to spread jobs and accommodate parenting obligations. See FRED BEST, *FLEXIBLE LIFE SCHEDULING: BREAKING THE EDUCATION-WORK-RETIREMENT LOCKSTEP* 8–10 (1980).

<sup>282</sup> See Arlene K. Daniels, *The Hidden Work of Constructing Class and Community: Women Volunteer Leaders in Social Philanthropy*, in *FAMILIES AND WORK* 220, 221 (Naomi Gerstel & Harriet Engel Gross eds., 1987) (describing "hidden work" done by women who volunteer in their communities); Schor, *supra* note 248, at 165–66.

<sup>283</sup> See SCHOR, *supra* note 222, at 154–55; Schor, *supra* note 248, at 167.

the work day and work week have been accompanied by increased productivity.<sup>284</sup>

Currently, however, reduced work hours are perceived as illegitimate because male workers' breadwinner life patterns still set the norm for work: The "ideal worker" is employed full-time, works overtime when necessary, and has limited responsibility for family work.<sup>285</sup> "Reduced work hours" is defined differently in each employment setting; in some occupations, a part-time job means forty hours per week. The one common theme in defining part-time work is that it is less than full-time work, which is defined as the amount of time that men ordinarily work.<sup>286</sup> Women working part-time, particularly in male-dominated fields where full-time work is the norm, find themselves marginalized in their workplaces, reporting that they tend to be excluded from organizational activities, interpersonal interactions, and skill or occupational development opportunities.<sup>287</sup> Although women who work part-time report greater job satisfaction and happiness with their work than full-time women, role overload and role conflict are ameliorated only if the women work in female-dominated professions; occupational norms in male-dominated professions place a high value on full-time work as evidence of commitment to one's career or market work.<sup>288</sup>

Finally, a reduction in working hours is consistent with feminist demands that men and women share caretaking and household responsibilities equally.<sup>289</sup> Although obviously not a complete answer to the problem of gender inequity in the second shift at home, reduced worktime is a necessary component of promoting equality in the family, both because it normalizes caregiver work patterns and because it provides more time to perform caregiving tasks.

Several commentators have issued modern calls for reduced worktime.<sup>290</sup>

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<sup>284</sup> See SCHOR, *supra* note 222, at 154-55.

<sup>285</sup> See WILLIAMS, *supra* note 76, at 1, 20.

<sup>286</sup> See *id.* at 71-73 (describing the meaning and significance of "part-time" in the executive and professional context).

<sup>287</sup> See Kathleen Barker, *Changing Assumptions and Contingent Solutions: The Costs and Benefits of Women Working Full- and Part-Time*, 28 SEX ROLES 47, 63-64 (1993).

<sup>288</sup> See *id.* at 66.

<sup>289</sup> See RHONA MAHONEY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* 4-5 (1995) (arguing that if real gender equality is to be achieved, men must do fully half the work of raising children and women will have to give up their roles as primary parents; this shift entails "a revolution in people's attitudes toward the sexual division of labor in the home" and the eradication of entrenched gender role stereotypes); ROEDIGER & FONER, *supra* note 260, at 276.

<sup>290</sup> See, e.g., Hochschild, *supra* note 109, at 245-58; Jacobs & Gerson, *supra* note 248, at 468-69; Schor, *supra* note 248, at 167-70.

Schor recommends a phased-in reduction of the forty-hour standard work week to a thirty-two hour standard, and elimination of premium overtime pay in favor of comp time at a rate of time and a half.<sup>291</sup> This would effectively allow workers to “save up” or “bank” their overtime hours and eventually permit a worker to shift to part-time work at full-time pay.<sup>292</sup> Schor correctly predicts the existence of union opposition to her proposal, since at current wage rates many hourly employees would not earn a living wage without the benefit of overtime wages.<sup>293</sup> Schor points out, however, that employers who utilize overtime work extensively recover or “undo” some of the overtime premium by resisting hourly wage raises; thus, hourly wages might actually rise in response to the elimination of overtime.<sup>294</sup>

Hochschild argues that a shorter-work-hours movement has radical potential to mobilize workers across gender and class lines. The increased presence of women in the labor force, the growing number of dual-earner families, and the need that children have for parental supervision and time combine to create a basis for common cause around the issue of reduced worktime.<sup>295</sup>

Moreover, unlike demands for higher wages, the shorter hours issue has potential to unite workers across lines of craft, skill, race, sex, ethnicity, and age, something that would greatly benefit organized labor in its struggle to revitalize itself.<sup>296</sup> It is far more difficult for employers to divide workers against one another when the demand is shorter hours than when it centers around the higher wage rates that have been the linchpin of industrial unionism and have tended to promote line-drawing and exclusion of less deserving workers, however they are defined.<sup>297</sup> Further, the shorter hours struggle has historically politicized labor's efforts and prompted legislative reforms limiting the hours of all workers, not

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<sup>291</sup> See Schor, *supra* note 248, at 167–70. Jerry Jacobs and Kathleen Gerson propose a 35-hour work week as “an expected standard to help articulate the ideals, values, and norms of our society.” Jacobs & Gerson, *supra* note 248, at 468. Fred Best suggests amending the FLSA to limit worktime on a per-year basis rather than on a per-week basis, with appropriate protections for employees against abuse of worker rights. See BEST, *supra* note 281, at 171–72.

<sup>292</sup> See SCHOR, *supra* note 222, at 143.

<sup>293</sup> See *infra* notes 308–12 and accompanying text.

<sup>294</sup> See SCHOR, *supra* note 222, at 144–45. Union leaders acknowledge this reality. See Roy, *supra* note 253, at C-1, C-2 (June 23, 1997) (noting AFL-CIO Director of Public Policy's observations that the high level of overtime is part of what is holding down regular hourly wages).

<sup>295</sup> See HOCHSCHILD, *supra* note 109, at 245–58; accord Jacobs & Gerson, *supra* note 248, at 470.

<sup>296</sup> See Stanley Aronowitz & Jonathan Cutler, *Can Unions Find a Strategy for Labor Market Strength?*, WORKING USA, May/June 1998 at 62, 62–63.

<sup>297</sup> See ROEDIGER & FONER, *supra* note 260, at vii–viii.

just the organized.<sup>298</sup> And finally, the hours issue directly addresses the struggle for control by workers over their work lives, and indirectly, their control over leisure time, intellectual development, and time dedicated to political activities.<sup>299</sup>

A reduced work week at full-time pay is not as farfetched as it might at first appear. As part of an effort to combat high unemployment rates, the French Parliament has adopted legislation reducing the current thirty-nine hour work week to a mandatory thirty-five hour work week with no reduction in pay, effective January 1, 2000.<sup>300</sup> The government hopes to encourage employers wishing to maintain production rates at current levels to hire additional workers. Toward that end, employers who reduce the work week while simultaneously increasing employment by at least six percent will receive a tax credit calculated on a per-worker basis; those employers who further reduce the work week to thirty-two hours while increasing employment by at least nine percent will receive an additional tax credit.<sup>301</sup> The Italian Prime Minister has pledged to follow suit with a law that would reduce the legal work week to thirty-five hours by the year 2001.<sup>302</sup>

#### 4. Legislative Fixes

Marketwide reforms are key to meeting employers' objections that reducing worktime to accommodate family caregiving will disadvantage them relative to their market competitors. The U.S. government could level the playing field by establishing minimum standards that require all employers of a certain size to adopt such policies as a condition of doing business in the United States.<sup>303</sup> Limiting hours of work and requiring employers to allow workers to bank hours or trade income for time could be mandated by a revised FLSA and encouraged through tax incentives.<sup>304</sup>

Congress last gave serious consideration to a reduction in the standard work

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<sup>298</sup> See *id.* at viii.

<sup>299</sup> See *id.* at viii-ix.

<sup>300</sup> See Barbara Casassus, *French Parliament Passes Law to Reduce Workweek to 35 Hours*, Daily Lab. Rep. (BNA) No. 101, at A-8 (May 27, 1998).

<sup>301</sup> See Lawrence J. Speer, *French Government Announces Plans to Mandate 35-Hour Workweek by 2000*, Daily Lab. Rep. (BNA) No. 198, at A-12 (Oct. 14, 1997); Lawrence J. Speer, *French Government Announces Financial Aid for Companies Enacting 35-Hour Workweek*, Daily Lab. Rep. (BNA) No. 203, at A-3 (Oct. 21, 1997).

<sup>302</sup> See *French Government Announces Financial Aid for Companies Enacting 35-Hour Workweek*, *supra* note 301, at A-3.

<sup>303</sup> See COONTZ, *supra* note 128, at 73.

<sup>304</sup> See Schor, *supra* note 248, at 168-69.

week at the federal level in the late 1970s, when Representative John Conyers introduced a proposal to amend the FLSA to reduce the standard work week to thirty-five hours, increasing premium pay for overtime as a disincentive to employers to utilize workers in excess of thirty-five hours, and eliminating mandatory overtime. Proponents of that bill sought to decrease unemployment, relieve stress on the job, improve employee morale and productivity, decrease absenteeism, enhance quality of life off the job, and conserve energy expended in commuting.<sup>305</sup> Opponents argued that a generalized worktime reduction would increase labor costs, feed inflation, and cause a drop in productivity, as well as increasing multiple job holding. The bill never got out of committee.<sup>306</sup>

Since 1995, Congress has been confronted with numerous bills proposing changes to the FLSA. These bills are intended either to relieve employers from the constraints of the forty-hour work week and overtime pay requirements or to give workers some flexibility to choose between time off and overtime pay.<sup>307</sup> While these proposals are promising because they signal Congressional willingness to rethink worktime norms established by the FLSA, they are also troubling because they have the potential to move us in the opposite direction—toward less family-friendly workplace policies regarding worktime.<sup>308</sup>

Recently, for example, Congress considered legislative measures that would have permitted workers effectively to bank hours in a limited fashion so that they could, in some weeks, work reduced hours in exchange for full time pay.<sup>309</sup>

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<sup>305</sup> See NEGREY, *supra* note 222, at 119–120.

<sup>306</sup> See *id.* at 120.

<sup>307</sup> See generally Nicholas Clark, *Fair Labor Standards Act Reform—It's Not Broke, So Don't Fix It*, 11 THE LABOR LAWYER 343 (1995) (summarizing and describing five bills proposed by employer lobbying groups during the 1995 legislative session).

<sup>308</sup> See David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMPLOYMENT & LAB. L. 74, 137 (1999) (analyzing proposed reforms of FLSA since 1997 and concluding that comp time reforms threaten worker entitlement to overtime pay and are more in the interests of employers than of workers).

<sup>309</sup> Republican Cass Ballenger introduced The Working Families Flexibility Act on January 7, 1997. Pamela M. Prah & Court Gifford, *GOP Workplace Proposals Awaiting Completion When Congress Returns*, Daily Lab. Rep. (BNA) No. 166, at C-1, C-8 (Aug. 27, 1997). In March of 1997, the House approved the bill, which would have amended the Fair Labor Standards Act to give hourly workers the option of receiving either overtime pay or compensatory time at a time-and-one-half rate for overtime work. See 143 CONG. REC. H1115, H1115–56 (daily ed. Mar. 19, 1997). It was passed by the House in 1997 as H.R. 1, The Working Families Flexibility Act. The bill had been introduced in 1995 as H.R. 2391, and was re-introduced and subsequently passed in 1996 in substantially similar form. See 142 CONG. REC. H8776, H8776–91 (daily ed. July 30, 1996).

Pursuant to the bill, the choice to take compensatory time in lieu of overtime pay must be voluntary, and the employee must request it in a written or verifiable statement. See *id.* at

Republican sponsors defended their bills on the grounds that many workers, particularly women, seek flexibility in their work hours to accommodate family caretaking obligations, and the new legislation would allow them to choose how they are compensated for overtime worked—with time off or money.<sup>310</sup>

The measures were strongly resisted by Democrats, the President, women's groups and organized labor on the basis that they would undermine the forty-hour work week, that they did not give employees adequate control over when the comp time was taken, and that they left employees vulnerable to employer

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H8787. The bill prohibited employers from intimidating, threatening or coercing employees into requesting compensatory time in lieu of overtime pay, or vice versa, and also prohibited employers from requiring employees to use compensatory time. *See id.* at H8787–88. Employees could accumulate up to 240 hours of compensatory time in a 12-month period, and employers would be required to either compensate them for time not used within that period or permitted them to use it; employers could refuse requests to use comp time made within a reasonable period if the use of the comp time would unduly disrupt the operations of the employer. *See id.* at H8788. The “unduly disrupt” standard has been in force in the public sector for years and is also present in the Family and Medical Leave Act.

Senator John Ashcroft sponsored an even more expansive version in the Senate, entitled The Family Friendly Workplace Act, that called for voluntary flex time as well as comp time; this measure did not garner enough Republican support to override a Democratic filibuster. *See GOP Workplace Proposals Awaiting Completion When Congress Returns, supra*, at C-1 (discussing S 4). The Family Friendly Workplace Act, originally introduced January 21, 1997, would have amended the FLSA to extend to private sector employees several benefits already available to public sector employees, including time-and-a-half compensatory time off, bi-weekly work programs, and flexible credit hour programs. The bill also sought to clarify the provisions relating to exemptions from coverage of certain professionals by the minimum wage and overtime provisions of the FLSA. *See id.* at C-8. The bill was reintroduced by Senator Ashcroft on June 17, 1999, with several changes designed to make it more palatable to its opponents (including a limit of 50 hours per week for employees on a bi-weekly work schedule, a requirement that employers pay employees at year-end for any comp time not taken, and a threshold requirement that employees have been at their jobs for one year before becoming eligible for flexible scheduling). *See Ashcroft Introduces Comp-Time Bill; Cites Parents' Need for Flexible Scheduling*, Daily Lab. Rep. (BNA) No. 117, at A-5 (June 18, 1999).

<sup>310</sup> A poll conducted by the Employment Policy Foundation, an employer-funded research group, had revealed that 75% of the respondents preferred a comp time option to the premium pay for overtime rule. *See Sana Siwolop, Overtime vs. Time Off: A Debate over a Choice*, N.Y. TIMES, Aug. 18, 1996, § 3, at 10. Federal, state, and local government employees have had the comp-time-in-lieu-of-overtime-pay option since 1985, and some private sector unions have negotiated such arrangements in their collective bargaining agreements. *See Comp Time in Lieu of Overtime Pay for Hourly Workers: Before the Subcomm. on Workforce Protections of the Comm. on Education & the Workforce Regarding H.R. 1 The Working Families Flexibility Act*, 105th Cong. (1997) available in 1997 WL 44984 (statement of Bob Weisman) [hereinafter *Hearings on H.R. 1*]; Siwolop, *supra*.

abuse.<sup>311</sup> Opponents' primary concerns were that the choice given to employees by the legislation would prove illusory because employers would attempt to coerce employees into taking comp time even if they would have preferred overtime pay, since the bills lacked effective enforcement provisions and funding for the predicted increase in education and enforcement costs associated with it.<sup>312</sup>

While opponents to the bills raised valid criticisms and were ultimately successful in defeating the bills, their resistance to the alteration of the forty-hour-per-week norm is instructive. Organized labor, in particular, opposed any deviation from the forty-hour-per-week norm and overtime pay requirements of

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<sup>311</sup> See *Hearings on H.R. 1*, *supra* note 310 (statement of Karen Nussbaum, Director, Working Women's Dep't, AFL-CIO), *available in* 1997 WL 44975 (arguing that the need to make up for declining wages is the major force creating time pressure for families to spend more and more hours in the paid workforce, and that flextime which provides flexibility to the employer without affording the employee the right to control hours worked is no solution to the problem of the work/family time squeeze, and advocating expansion of the Family and Medical Leave Act to cover more employers and to provide time off for a greater variety of family needs instead); *id.* (Testimony of Helen L. Norton, Director, Equal Opportunity Programs, Women's Legal Defense Fund) *available in* 1997 WL 44998 (expressing concerns about employees' lack of control over when the comp time is taken, likelihood that employees will be pressured by employers to choose time over money, and the risks that comp time rights will disappear in industries where employers close up shop while owing comp time to employees, and pointing out that the bills do not relieve employees from mandatory overtime); *GOP Workplace Proposals Awaiting Completion When Congress Returns*, *supra* note 309, at C-1 (discussing H.R. 1).

The Family Friendly Workplace Act was vehemently opposed by labor and women's groups, primarily because in addition to comp-time-in-lieu-of-overtime-pay options similar to those featured in the Working Families Flexibility Act, it contained a "biweekly work program" provision which would have allowed employers the flexibility to spread 80 hours' worth of work per employee over a two-week period in the manner most advantageous to employers. Thus, employers would have been able to require employees to work 60 hours in one week and 20 in the next without paying overtime, and to vary this from one two-week period to the next, an arrangement which workers with child care needs would find difficult if not impossible to accommodate. See Court Gifford, *Comp Time Bill Faces Test in Senate, Another Cloture Vote Scheduled for June 4*, *Daily Lab. Rep. (BNA)*, No. 106 at A-5, (June 3, 1997); Ellen Goodman, *Working Families Flex Act Is Highway Robbery*, *FLA. TODAY*, Apr. 1, 1997, at 7A. Women's groups opposing the bill included 9 To 5 The National Association of Working Women; The American Nurses' Association; Business and Professional Women USA; the National Council of Jewish Women; the National Women's Law Center; and the Women's Legal Defense Fund.

<sup>312</sup> See *Hearings on H.R. 1*, *supra* note 310 (statement of Karen Nussbaum, Director of Working Women's Dep't, AFL-CIO); *id.* (Testimony of Helen L. Norton, Director, Equal Opportunity Programs, Women's Legal Defense Fund)

the FLSA.<sup>313</sup> Democrats responded instead with legislation designed to preserve the forty-hour work week while allowing hourly workers more choice as to when they can use time off, and barring discrimination against workers who choose overtime pay rather than comp pay.<sup>314</sup> Democrats also introduced the Family and Medical Leave Enhancement Act, and proposed further expansion of the Family and Medical Leave Act.<sup>315</sup>

### 5. Summary

Reduced worktime is an essential element of any effort to restructure paid work so that it is more compatible with caregiving. The FLSA's forty-hour-per-week standard has become a floor, rather than a ceiling, and overtime hours are the norm. Rigid mandatory work hours and the expectation of continuous, uninterrupted employment combine with the length of the work week to squeeze out caregiving and family time, leading to marital tension and a parenting deficit.

In addition to impacting marital harmony and parenting, work overload hampers productivity in paid work and diminishes civic and community involvement. Reduced worktime thus potentially benefits both individual families and the larger society. To be truly effective and to avoid replicating gendered patterns of division of labor, however, reduced worktime must be implemented at a macro level through legislative changes to the worktime norms

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<sup>313</sup> See Goodman, *supra* note 311, at 7A (explaining that organized labor resisted comp time legislation out of a desire to protect overtime pay); Walsh, *supra* note 308, at 132 (observing that the most vigorous opposition to FLSA comp time amendments has come from organized labor).

<sup>314</sup> See Gifford, *supra* note 311 (discussing H.R. 1302 and S. 1009). More forward-thinking commentators have suggested legislative amendments that would allow employees to borrow time up front as well as to lend time to their employers, bank hours, cash out of comp time credits at any time, and move freely between comp time and overtime pay status, impose a ban on mandatory overtime, install a shorter work week and impose statutory upper boundaries on hours in any given week, allocate more resources for FLSA enforcement divisions to prevent increases in abuse or noncompliance, and legislate a high standard of proof for "undue business disruption." See, e.g., Golden, *supra* note 253, at 508.

<sup>315</sup> See *GOP Workplace Proposals Awaiting Completion When Congress Returns*, *supra* note 309, at C-1. In 1997, Democrats introduced three bills to amend the FMLA. The Family and Medical Leave Improvements Act, introduced January 7, 1997 by Representative Clay, would amend the FMLA to allow the use of 24 hours of unpaid leave a year for school-related purposes, and would lower the threshold for coverage to employers of 25 employees. The Family and Medical Leave Fairness Act, introduced January 22, 1997 by Senator Dodd, would have amended the FMLA to lower the threshold for coverage to employers of 25 employees. The Time for Schools Act was introduced February 5, 1997 by Senator Murray, and sought to amend the FMLA to allow the use of 24 hours of leave per year for school-related purposes. See *id.* at C-7, C-8.



articulated in the FLSA. Such changes are not an impossible dream: Other countries have pursued such a course, the issue has potential broad-based support, and Congress has indicated that it is willing to rethink the standards expressed in the FLSA.<sup>316</sup>

While reduced work can produce the time necessary for balanced lives, it can do so only if the work schedule is sufficiently predictable or under workers' control, if pay is adequate to enable workers to live at accepted standards of living, and if job security is present so that workers feel comfortable investing leisure time in child care, family activities, and community activities rather than making themselves constantly available for work. Only under these types of conditions will reduced work likely further achievement of such a balance rather than frustrate it.<sup>317</sup>

### *B. Worksite-Specific Strategies: Relinking Paid Work and Family Life*

Reduced worktime represents only half a solution. In order for both employees and employers to reap the maximum benefits of restructuring paid work, paid work must be integrated with family life and the values of the market altered to foster rather than block caregiving. This means demolishing the rigid separation between home and market that characterized the industrial economy; casting aside the no-longer-serviceable notion that long hours and "face time" necessarily equate with productivity and finding other ways to measure productivity; and asking workers what programs they need from employers in order to foster productivity and alleviate family pressures.

Recently, the Ford Foundation undertook research partnerships with Corning, Xerox, and Tandem Computers to investigate assumptions structuring standard work arrangements to determine what relationship these assumptions have to productivity. The authors produced a report entitled "Relinking Life and Work" that concluded that the profound separation of work and family in American work culture undermines both work efficiency and family life; because many of the same assumptions that block work-family integration also lead to inefficient or unproductive work practices, challenging old assumptions provides a strategic opportunity for restructuring work to produce win-win results for both employees and employers.<sup>318</sup> This Section collects ideas

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<sup>316</sup> At least one commentator believes that "given political realities, it is likely that some form of comp time legislation will be enacted in the foreseeable future." See Walsh, *supra* note 308, at 128. Unions could certainly use this as a "springboard for advancing a broader agenda focusing on attaining greater control over work hours," whether before the legislature or in collective bargaining with employers. See *id.* at 132.

<sup>317</sup> See NEGREY, *supra* note 222, at 123-25.

<sup>318</sup> RHONDA RAPOPORT & LOTTE BAILYN, FORD FOUND. REPORT, at Executive Summary

articulated in their report as well as other productivity-enhancing measures that integrate home and work, while simultaneously challenging gendered assumptions about work and family, offering them as illustrations of worksite-specific reforms that could be initiated even without legislative changes.

### 1. *Where We Are*

Employment policy, work practices, and employer expectations continue to reflect a strict separation between work and home, a belief that work and family are inherently in competition with one another, and an expectation that workers should display a primary commitment to work and behave as if home obligations do not exist.<sup>319</sup> Researchers engaged in the Ford Foundation project found that:

[T]he dominant societal image of the ideal worker as "career-primary," the person who is able and willing to put work first and for whom work time is infinitely expandable. . . . translated into work practices that, as is typical now in corporations, include dawn meetings, planning sessions that run into the evening, often ending with the suggestion to "continue this over dinner," and training programs requiring long absences from home. Commitment is measured by what one manager proudly declared as his definition of a star engineer: "someone who doesn't know enough to go home at night." At lower

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(1995) available in <<http://www.fordfound.org>> (visited Mar. 20, 2000); see also LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN, AND TIME IN THE NEW CORPORATE WORLD* 125-33 (1993) (discussing new facilitating assumptions which must replace old constraining assumptions, including a norm of discontinuity in employment rather than an expectation of continuous commitment, managerial styles which assume that employees are trustworthy and make them accountable for results rather than controlling them through continuous surveillance and reporting requirements, and openness to learning from the diversity of the employees' experience rather than selecting employees who are homogenous in outlooks and values).

Among the constraining assumptions identified by the researchers were the following: Time is an indicator of commitment, productivity and results; part-time workers aren't as committed as full-time workers; single people have more time to devote to work; most men have stay-at-home wives. See Barbara E. Miller, *Rescue Your Work/Life Program*, *WORKFORCE MAG.*, June 1997, at 84, 86. Thus, employees who work more hours are considered most committed and valuable to the enterprise regardless of output, when in fact another worker may simply be making more efficient use of time. If company policy is to reward and promote those who work long hours, employees will soon learn that long hours rather than output are rewarded, and the company policy may actually end up rewarding inefficiency and lack of production! See *id.* at 88. Similarly, informal office "face time" requirements may end up inhibiting productivity if work tasks require uninterrupted, focused time. If work could be done more efficiently with quiet time at home than it could in the office, perhaps the solution is to allow the employee charged with such tasks to work at home one or two days per week, saving the commute time for the employee and garnering for the employer enhanced productivity during the hours actually worked. See *id.* at 90.

<sup>319</sup> See RAPOPORT & BAILYN, *supra* note 318 at pt.2.

levels in the organization, the belief in the dominance of work translated into tight controls over worker time and flexibility.<sup>320</sup>

Employees adapt to the system by hiding or denying their personal lives at work, dissembling about why they need to leave work early and acting as if they do not have families.<sup>321</sup> This is a gendered construct: For men, family responsibilities have traditionally enhanced career opportunities and upward mobility because the male provider role has been understood in its narrowest economic terms; for women, family responsibilities have been viewed as conflicting with career advancement because of women's presumed contribution as homemakers and caregivers.<sup>322</sup> Thus, women are especially likely to downplay their family lives because of the risk that they will be seen as uncommitted to their careers.<sup>323</sup>

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<sup>320</sup> *Id.*

<sup>321</sup> One company discovered to its surprise that an astonishingly large number of its managers admitted in an anonymous survey to having faked being sick in order to attend a child's event. See Gillian Flynn, *Making A Business Case for Balance*, WORKFORCE MAG., Mar. 1997, at 70.

<sup>322</sup> Employment in our society is structured on the premise that workers have wives who will assume primary responsibility for family caretaking. See Joan C. Williams, *Deconstructing Gender*, *supra* note 102, at 822–23. This is particularly true for male-dominated jobs that tend to be higher-paying. Joan Williams has made a persuasive case that seemingly objective gender-neutral work requirements shaped by this premise violate Title VII because they disproportionately impact women and economically marginalize them. See WILLIAMS, *supra* note 76, at 104–10 (describing how Title VII disparate impact litigation could be used to challenge jobs designed around masculine social and physical norms ranging from the nonavailability of part-time work in some occupations to cockpits sized for men's bodies); see also Deborah J. Vagins, Note, *Occupational Segregation and the Male-Worker Norm: Challenging Objective Work Requirements Under Title VII*, 18 WOMEN'S RIGHTS L. REP. 79, 82–86 (1996). Such gendered constructs impact especially harshly on single parent families, who now constitute 26% of all families with minor children and represent the most rapidly-growing family form in the United States. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 21–22, 68–69 (1995) (explaining how the structure of employment and the law regulating it are oriented toward the male breadwinner rather than the caretaking parent).

<sup>323</sup> See RAPOPORT & BAILYN, *supra* note 318 at pt.2. Employed women are caught in a classic double-bind, because expectations that they are or should be “family-primary” taint them as unfit for the labor market, while women who step outside of prescribed gender roles by failing to display a family-primary attitude may be punished as well. In short, “[t]he work culture mandates that they subordinate caring for their families but punishes them for doing so.” *Id.*

Men who step outside prescribed gender roles are also punished if their family responsibilities appear to be long-term rather than brief and time-limited in nature. See *id.* Employer hostility to men's requests for work accommodations to family caregiving

In an effort both to accommodate their own needs for flexibility in staffing and to attract and retain workers who have developed an entrepreneurial attitude toward work, employers have begun to tinker with the structure of work. Many published articles tout the rise of telecommuting, flexplace, flextime, part-time, and job-sharing in today's marketplace.<sup>324</sup> These changes alter the way work is done as well as when and where it is done, and offer significant potential for breaking down the artificial barriers between work and family life, between public and private space and time.

A recent poll indicates that work-family balance issues are a pressing concern for the vast majority of employees.<sup>325</sup> Nearly all major businesses now acknowledge the significance of their employees' need to balance work and family obligations and the difficulties of doing so for a dual-earning couple.<sup>326</sup> A 1991 study surveyed 188 of the largest companies in thirty industries, and found that 100% offer maternity leave, 88% offer part-time work, 77% offer flextime (typically with a 1 to 2 hour band on either end of the day), 48% have job-sharing arrangements (usually informally negotiated), and 68% are developing or considering new programs.<sup>327</sup> The fact that some 40% percent of large

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responsibilities is well-documented. See Malin, *supra* note 202, at 1077-78; see also Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 397 (1999) (urging reforms in the Family and Medical Leave Act designed to encourage men to "begin to act more like women in the workplace" by taking on family care obligations).

<sup>324</sup> See, e.g., Lisa Stansky, *Changing Shifts*, A.B.A. J., June 1997, at 55.

<sup>325</sup> See *Spending More Time With Family Top Concern of Workers, Survey Says*, Daily Lab. Rep. (BNA) No. 53, at A-9 (Mar. 19, 1999).

<sup>326</sup> One author summarized the evidence of business interest in the topic as follows:

[I]ndicators [of business interest in the subject of work and family benefits and their relation to productivity] are that the *Wall Street Journal* now runs a weekly column on work/family and recently published a special supplement on the theme (June 21, 1993), *Business Week* (June 28, 1993) devoted a cover article to the topic, *Human Resource Management* devoted a special issue of the journal to it, and *Working Women* magazine [sic] publishes an annual issue on the most family-friendly companies. In addition, the Bureau of National Affairs organizes an annual conference on work/family, and the Conference Board has established a center devoted to the issue. Finally, a number of consulting firms, including Work/Family Directions, Catalyst, and the Families and Work Institute, have been created that provide services to firms as well as engage in research and advocacy on the topic.

Osterman, *supra* note 2, at 682.

<sup>327</sup> Charlene Marmer Solomon, *Work/Family's Failing Grade: Why Today's Initiatives Aren't Enough*, PERSONNEL J., May 1994, at 72, 76. At least one study, however, has concluded that much of the attention amounts to lip-service, and that work/family programs—especially those featuring costly benefits—are not particularly widespread. See Osterman, *supra* note 2, at 688, 689 (reporting the results of a national survey of private sector employers

companies surveyed offer the same core set of work/life programs and related policies and benefits suggests that "the bar is being raised": Employers who wish to compete for talent in today's labor market will need to offer work/life benefit programs in order to attract and retain employees.<sup>328</sup>

Nevertheless, work/family programs have tended to remain on the periphery of employers' range of concerns. Researchers have posited various reasons for this. First, work/family is still perceived as a corporate welfare program, rather than as a business strategy: employers institute family-friendly programs against the historical backdrop in which employers were expected to bear some responsibility for workers and their dependents, rather than because such programs are understood as enhancing business productivity.<sup>329</sup> Thus, employers may be interested only in creating the illusion of community and support, while simultaneously cutting other benefits (for example, health insurance coverage) in order to finance the new and more visible work/family benefits.<sup>330</sup> Only if work/family programs are seen as "strategic tools for competitive advantage" and linked to issues of employee recruitment and retention, performance, and enhanced productivity, will corporations place them at center stage.<sup>331</sup>

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which revealed that only 15% of employers have a full-time employee charged with handling work/family issues, relatively few employers have on-site or even off-site subsidized day care programs, and the least costly work/family benefits are the most prevalent, and concluding that only a minority of employers—those who are seeking to implement high-performance, high-commitment, innovative work systems—are likely to invest in work/family benefit programs that potentially empower employees and produce high levels of employee commitment to the firm).

<sup>328</sup> See Greenfield & Terry, *supra* note 213, at 68. Tight labor markets where talent is in limited supply and turnover is high have prompted competition between those seeking to be known as the most family-friendly employers. See Sue Shellenbarger, *Work & Family: Accounting Firms Battle to Be Known as Best Workplaces*, WALL ST. J., Jan. 21, 1998, at B1. The core set or "baseline" work/life programs offered by these employers include: unpaid personal leaves of absence, employee assistance programs, dependent care spending accounts, personal days, vacation day carryover, gradual return to work following disability or parental leaves, flextime, tuition reimbursement for nonbusiness-related courses, assistance with financial planning, child care resource and referral, enhanced health insurance coverage, and prorated benefits for part-time workers. See Greenfield & Terry, *supra* note 216, at 69, fig.1.

<sup>329</sup> See Gonyea & Googins, *supra* note 115, at 69–70.

<sup>330</sup> See Osterman, *supra* note 2, at 697. Osterman points out that employer initiatives in the work/family benefits arena are strikingly reminiscent of historical welfare capitalism, in which companies provided previously unknown benefits—life insurance, company housing, social work, and recreational programs—in an effort to tie the individual employee to the firm and fend off unionization. See *id.*; see also *supra* notes 210–12 and accompanying text.

<sup>331</sup> See Gonyea & Googins, *supra* note 115, at 71; see also Osterman, *supra* note 2, at 698 (suggesting that the performance gains achieved by high-commitment workforces and the centrality and prevalence of work/family benefits in those firms may help to ensure that

Second, work/family programs tend to focus on parenting issues and to ignore the wider spectrum of life interests that contribute to a healthy balance between work and leisure, including involvement in politics, civic affairs, community volunteer organizations, church, education, personal growth, and hobbies. Thus, they are seen as benefiting only working parents, rather than benefiting all employees.<sup>332</sup> This perception poses a substantial risk that childless workers will become resentful at the prospect of shouldering an extra workload when parents take advantage of leave or flexible work arrangements.<sup>333</sup> A related problem stems from the fact that work/family programs are viewed as disproportionately beneficial to women. This perception tends to divide the workforce along gender lines and to deter men and women from taking advantage of them because of the stigma traditionally associated with appearing to be less committed to career than to family.<sup>334</sup>

In order for work/family programs to assume center stage in workplace policy, a new social contract must be forged between employers and workers that is predicated on the common interests of both in flexibility and productivity. Companies that recognize employees' need for flexible scheduling, in order to maintain equilibrium between work and home life, will reap the reward of employees who are psychologically engaged in their jobs because they bring their "full" selves to work—including their identities as women, African Americans, Latinos (and Latinas), gays or lesbians, caregivers, parents, and church or community volunteers.<sup>335</sup> A growing body of research implies that workers who feel personally supported by their employers are more likely to think innovatively on the job, make important contributions at work, and feel

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work/family programs have a robust future and are not just a passing fad).

<sup>332</sup> Gonyea & Googins, *supra* note 115, at 69. This is particularly shortsighted in light of the universal problems faced by adult workers with responsibility for the care of aging parents.

<sup>333</sup> See RAPOPORT & BAILYN, *supra* note 318 at pt.2.

<sup>334</sup> See *id.*; Gonyea & Googins, *supra* note 115, at 70 (describing stigma connected with "mommy track" benefits).

<sup>335</sup> See Gonyea & Googins, *supra* note 115, at 73–74 (citing V.A. Parker & D.T. Hall, *Workplace Flexibility: Faddish or Fundamental*, in BUILDING THE COMPETITIVE WORKFORCE 122–55 (P.H. Mirvis ed., 1993)). The Ford Foundation researchers found that "integrated" workers—those who linked the spheres of their life in the way they worked—drew on skills and values associated with the family sphere such as collaboration, sharing, empathy, and nurturing, as well as those associated with the public work sphere, such as rationality, linear thinking, assertiveness, and competition. See RAPOPORT & BAILYN, *supra* note 318 at pt.2. Integrated workers (many of whom were women) did more behind-the-scenes work to smooth interactions between people so that the work project would not be disrupted; took time to teach others or to pass on key information to other groups; and routinely affirmed and acknowledged the contributions of others, building on them rather than attacking them. *Id.*

more attached and loyal to the organization.<sup>336</sup> Further, such workers are likely to be happier with their home lives and less distracted by worries about unmet family caretaking obligations, which in turn further enhances the likelihood of stability and productivity at work.<sup>337</sup>

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<sup>336</sup> See Robert Eisenberger, et al., *Perceived Organization Support and Employee Diligence, Commitment, and Innovation*, 75 J. APPLIED PSYCH. 51, 55, 57 (1990); Gonyea & Googins, *supra* note 115, at 74.

Some benefits offered by firms seeking to boost employee morale and enhance productivity and firm loyalty target links between work and family or community ties. Fel-Pro, an Illinois-based designer, manufacturer, and marketer of automotive gaskets and engine sealants, boasts increased productivity, employee suggestions for improvements that generated \$9.6 million in the first 10 months of 1996, and an employee turnover rate of just over 10%—an exceptional rate of retention in a tight market for unskilled labor. See Vicki Gerson, *Pinning Down the Value of Premier Benefits*, BUS. & HEALTH, Feb. 1997, at 31. Researchers at the University of Chicago who studied Fel-Pro looking for connections between its family-friendly policies and employee morale and work behavior found that employees who took advantage of Fel-Pro's cradle-to-grave family benefits identified closely with the firm, helped coworkers, and showed initiative in submitting product improvement suggestions. See *id.* at 38. Fel-Pro attributes its employees' high morale and commitment to its comprehensive benefits package and overall attitude toward employees. The package includes a wedding gift of \$1,000; enrollment in a prenatal program called Healthy Start; breast pumps provided for new mothers to use during lunch or breaks; a new baby \$1,000 savings bond; adoption assistance; an on-site day care center featuring computer classes; summer day camp; high school graduation gifts; free counseling to assist with college applications and selection; a scholarship program that provides each child of every full-time employee with up to \$3,500 per year tuition for college or post-secondary trade school; the same levels of tuition reimbursement for workers themselves; payroll advances to fund the purchase of a computer (Fel-Pro's operation is increasingly computerized, and Fel-Pro has an interest in helping employees become computer literate); an on-site fitness center featuring workshops on personal development; matching funds for employee charitable donations; birthday and anniversary bonuses; elder care referral services; a death benefit of \$250; a vacation-purchase program allowing employees with less than four weeks' annual vacation to trade five days' pay for extra time off; profit sharing, Christmas bonuses, and a pay scale in the 75th percentile of that offered by local employers. See *id.* at 34–35. See also Vivienne Walt, *The Cutting Edge: Some Companies Do a Lot More Than Just Talk About Being Family-Friendly*, WALL ST. J., Mar. 31, 1997, at B14, available in 1997 WL 2415012 (illustrating a Fel-Pro employee's use of the company's summer camp).

<sup>337</sup> See Gonyea & Googins, *supra* note 115, at 74; see *Company-Sponsored Efforts Yield Benefits, Significant Savings for Employers, Workers*, Daily Lab. Rep. (BNA) No. 9, at A-3 (Jan. 14, 1998) (discussing report concluding that employers receive a 3-1 return on monies they spend on establishing work/family programs and investments they make in the community, through the benefits of improved recruitment and enhanced company image, reduced turnover, reduced absenteeism and tardiness, higher performance, increased focus, and increased productivity).

## 2. Illustrative Strategies for Reforming Work and Enhancing Productivity

The Ford Foundation researchers found that the best way to link work and family, rendering changes in work form, business issues, and work/family accommodations, was to ask the following three questions: (1) How is work done here? (2) What are employees' personal stories of work-family integration? and (3) What is it about the way work is done here that makes it difficult (or easy) to juggle work and personal life so that neither one suffers?<sup>338</sup> What follows is a sampling of answers that have emerged when employers asked these questions.

### a. Control and Flexibility

Control over work scheduling and work location is probably the key benefit prized by employees. Control is typically achieved through flexible work programs. The appeal of flexible work is universal across workers of all ages, which is important since thirty-six percent of the workforce is single and has no children under age eighteen.<sup>339</sup> Flexibility can be utilized to accommodate a wide range of activities, including attendance at children's events, caring for older relatives, waiting for deliveries of furniture or repair persons, making a difficult commute, participating in sports or other recreational or community activities, and pursuing educational goals.<sup>340</sup>

Flexibility comes in various forms. A 1993 survey of 480 large employers found that 71% allow flexible scheduling within a narrow time band (still requiring 8 hours per day), while others offer still more flexibility—including flexibility in the length of the week (fewer but longer days or shorter days in 6-day weeks), reduced time options (part-time and job sharing) and flexibility in place (telecommuting, branch offices).<sup>341</sup> Employers that instituted flexible scheduling typically did so because it enhanced productivity. For example, First Tennessee Bank in Memphis restructured work schedules in its accounts-reconciliation department to include longer days at the beginning of the month and time off later in the month when its workload was lighter. The department's productivity improved significantly as a result.<sup>342</sup> First Tennessee's work/life

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<sup>338</sup> See RAPOPORT & BILLYN, *supra* note 318 at pt.2.

<sup>339</sup> See Sameera Khan, 'Family' Perks of No Benefit to Many Employees, BUS. INS., July 25, 1994, at 3, 4 (quoting the 36% figure, and attributing it to the Bureau of Labor Statistics).

<sup>340</sup> See Deborah Shalowitz Cowans, *New Work Options Increase Flexibility*, BUS. INS., July 25, 1994, at 3, 4.

<sup>341</sup> See *id.* (quoting the Coopers & Lybrand 1993 study); see also Charlene Marmer Solomon, *Flexibility Comes Out of Flux*, PERSONNEL J., June 1996, at 34, 36.

<sup>342</sup> See generally Walt, *supra* note 336.



strategy and programs—which also include options to work at home a few days per week, part-time schedules with full benefits, and two hours per week of flexible time available for “juggling” to accommodate family obligations and doctor’s appointments—allowed it to retain its employees twice as long as the bank average. This increased employee retention saved more than \$3 million in turnover costs. First Tennessee also experienced higher customer retention rates that in turn yielded substantial profits: The Bank estimated a 55% profit gain of \$106 million between 1994 and 1995.<sup>343</sup> Key to the program’s success, according to Bank officials, was the fact that employees themselves designed the new policy in conjunction with their managers.<sup>344</sup>

b. *Bringing Family to Work*

The Family and Medical Leave Act’s requirement of a twelve-week unpaid leave<sup>345</sup> has prompted some unusual employer initiatives. San Jose National Bank features a unique plan called “Babies in the Workplace,” under which pregnant workers agree to take only eight weeks of unpaid leave surrounding childbirth (rather than the twelve allowed by the FMLA) and in exchange may return to work with their babies, bringing them to the workplace until the children turn six months old or begin to crawl.<sup>346</sup> The arrangement saves the company approximately \$60,000 per worker by avoiding turnover and the associated training costs. So far, the arrangement has yielded an impressive one hundred percent retention rate for new mothers.<sup>347</sup>

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<sup>343</sup> See Flynn, *supra* note 321, at 68, 69, 71, 72.

<sup>344</sup> See *id.* at 70, 71.

Similarly, an upstate-New York-based photographic products company called Optimization Technology, Inc. found that flexible work rules for employees yielded big payoffs. Optimization offers totally flexible hours with no need to seek prior approval as long as each employee completes forty hours per week (allowing parents to adjust their schedules day-to-day to fit their children’s routines and ferry them to after-school activities), subsidized child care in the building, and no time clocks, making it one of the most popular employers in the area. See Walt, *supra* note 336, at B14.

<sup>345</sup> See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6, codified at 29 U.S.C. § 2612(a)(1) (1994).

<sup>346</sup> San Jose National Bank President Jim Kenney announced the plan to his staff on the date the FMLA took effect. See Marilyn Gardner, *When Offices Double as Nurseries*, CHRISTIAN SCI. MONITOR, Apr. 7, 1994, at 13, 13.

<sup>347</sup> Still another employer, a marketing company called TC3 located in Austin, Texas, set up a building adjacent to the main office for new mothers who return to work with their babies until the babies are old enough to crawl—at which point most are ready to make child-care arrangements. See Shu Costa, *The Business of Bringing Up Baby: Firms Set Up Place for Moms and Tots to Work, Play Side by Side*, DALLAS MORNING NEWS, May 1, 1996, at 5C,

Subsidized on-site day care has proved an increasingly popular drawing card for other employers. One recent survey found that twelve percent of employers had an on-site facility, an additional eight percent had arranged for care at a nearby center, and five percent belonged to a consortium of employers that sponsored a facility.<sup>348</sup> The payoff for employers includes substantially reduced employee turnover rates, the ability to recruit and retain experienced staff, reduced absenteeism (emergency care for sick children may be made available on-site even for children who are not enrolled in the day-care program), and improved employee focus in the absence of worries about where children are and how they are doing.<sup>349</sup> Recent state and federal legislative action suggests that additional employer incentives may soon be forthcoming in the form of tax benefits.<sup>350</sup>

A "family" issue that is increasingly intruding on the workplace is domestic violence. Domestic violence affects its victims' workplace productivity, causes absenteeism, and leads to increased health care costs; moreover, it follows victims into the workplace, endangering other workers and impairing their productivity. The Bureau of National Affairs estimates that the price tag for corporate America is between \$3 billion and \$5 billion annually.<sup>351</sup> Many employers now provide Employee Assistance Programs designed to provide counseling and referrals for those with substance abuse and family problems such as marital discord or domestic violence; some employers sponsor workshops and seminars on domestic violence, offer employee support groups and make donations to battered women's shelters, or accommodate women who need time off to seek safe housing, attend court appearances, or take leaves of absence.<sup>352</sup>

### 3. *Risks and Pitfalls*

It is important not to take so-called "family friendly" programs at face value. In some cases, while a company offers a state-of-the-art menu of family-friendly policies, employees are still judged based on whether they have put in sufficient "face time," rather than by output or merit: As Hochschild's research suggested,

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available in 1996 WL 2119258.

<sup>348</sup> See *On-Site Child Care Centers Increasingly Pique Employer Interest*, Daily Lab. Rep. (BNA) No. 41, at C-1 (Mar. 3, 1999).

<sup>349</sup> See Walt, *supra* note 336, at B14.

<sup>350</sup> See generally *On-Site Child Care Centers Increasingly Pique Employer Interest*, *supra* note 348.

<sup>351</sup> See Charlene Marmer Solomon, *Talking Frankly About Domestic Violence*, PERSONNEL J., Apr. 1995, at 62, 64.

<sup>352</sup> See *id.* at 65.

even employers with liberal formal policies favoring flextime and job sharing may communicate informally that adherence to the traditional face time mentality is required.<sup>353</sup>

Flexibility, for example, is as much a matter of firm philosophy as it is a question of which benefits are available. Some policies that are touted as family-friendly, such as compressed work weeks or flextime schedules that still require 8 hours per day but shift the hours from 8-4 to 7-3, actually inject further rigidity into work scheduling. By contrast, most employees say they need flexibility to control and adjust their own schedules. For example, in a 1995 study, employees gave top priority to a "paid time-off bank" that would afford them the option to choose how and when to use their accrued time.<sup>354</sup> Similarly, even highly visible benefits like on-site child care may not be preferable from employees' standpoint to assistance in locating child care close to home, back-up child care in the event of illness of the child or unavailability of the caretaker, or dependent-care flexible-spending accounts.<sup>355</sup>

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<sup>353</sup> See Ellen C. Bankert & Bradley K. Googins, *Family-Friendly—Says Who?*, ACROSS THE BOARD, July/Aug. 1996, at 45, 48 (stating that corporations are maintaining their traditional "face time" mentality even though implementing formal policies of flextime and job-sharing).

<sup>354</sup> See *id.* at 48. Leave banks work best in conjunction with generous vacation and leave policies. Employees at the Bureau of National Affairs, a publishing company in Washington, D.C., enjoy a leave bank into which employees may donate unused paid vacation days, to be pooled and used by employees who need them. In light of the company's substantial vacation benefits (2 weeks of paid vacation upon hire, scaling up to 5 weeks after 14 years), many employees find themselves donating unused time; requests to borrow from the bank have come from women with high-risk pregnancies or employees suffering serious illnesses who need recuperation time. See Michele Weldon, *Banking on Balance: Need More Time Off? Borrow Some*, CHI. TRIB., Aug. 25, 1996, at 7.

<sup>355</sup> See Bankert & Googins, *supra* note 353, at 48. While some benefits may garner favorable publicity and generate short-term goodwill among employees, those that fall short of challenging fundamental assumptions about work and family as separate spheres and that fail to provide workers with control over their schedules provide little of lasting benefit. See, e.g., Leslie Faught, *At Eddie Bauer You Can Work and Have a Life*, WORKFORCE MAG., Apr. 1997, at 83, 84, 89, 90 (detailing how "small touches yield big profits" in employee morale at Eddie Bauer, Inc., and giving examples such as calling employees "associates," allowing them one "Balance Day" per year when they may "call in well" to schedule an absence, instituting a casual dress code, adopting a compressed work week, offering an "outdoor experience allowance" subsidizing outdoor activities such as golf, mountain climbing, and skiing, and initiating a health benefits wellness package that pays for itself in lowering health care costs). This is not to say that such programs are of no value. Clearly, such benefits as emergency child care services, paid parental leave, and a child and elder care referral service—which Eddie Bauer also offers—are of significant value to many employees. The point is that one must look beneath the surface of such programs, asking whether they challenge the fundamental assumption that work and family life are separate spheres.

The key is that employees, not the employer, are likely to know best what they need; employers who are limited by their own assumptions about employee needs and interests or who conduct rigid surveys are not likely to discover what the employees actually desire.<sup>356</sup> Benefits that are not useful to employees, or that employees know they will be punished for claiming, do not deliver the same sense of employee commitment and loyalty to the company. Employees who utilize and value company benefits are far more likely to participate wholeheartedly in their work and to manifest the benefits of improved work performance and morale.<sup>357</sup>

Ironically, the initiatives that produce the biggest productivity gains and best promote employee retention are often those that cost the least: flexible scheduling, job sharing, and part-time options cost little to implement but seem to have the biggest payoffs, while big-ticket projects like on-site child care serve a small percentage of the company's employees and cost the most to implement.<sup>358</sup> Nevertheless, the type of benefit that is most likely to enhance productivity and morale varies from industry to industry depending upon workforce composition and locale. For example, Marriott discovered that the most valued benefits for its predominantly immigrant, low-waged workforce included a hotline featuring bilingual social workers who provided workers with information on housing, transportation, and legal and domestic violence problems, and child and elder care referral services; the hotline reduced employee turnover significantly, increased productivity and reduced absenteeism and tardiness.<sup>359</sup>

On the other hand, Lancaster Laboratories, an analytical testing lab in Lancaster, Pennsylvania, found that an on-site child care center reduced turnover so significantly that the program, although costly, saves the company money. Before the center opened, 50% of workers who went on maternity leave did not return. After the center opened, 94% of new mothers returned. Since the cost of replacing one employee is between \$10,000 and \$15,000, and 10 to 15 women typically take maternity leave each year, the company saves at least twice as much as the \$50,000 per year that it spends on the center.<sup>360</sup> Still other

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<sup>356</sup> See Bankert & Googins, *supra* note 353, at 49.

<sup>357</sup> See Solomon, *supra* note 327, at 78.

<sup>358</sup> See Julia Lawlor, *The Bottom Line on Work-Family Programs*, WORKING WOMAN, July-Aug. 1996, at 54, 56; see also Sue Shellenbarger, *Employers Are Finding It Doesn't Cost Much to Make a Staff Happy*, WALL ST. J., Nov. 19, 1997, at B1 (allowing employees to choose their own shifts, providing flexibility in work hours, improving worker morale through communication, and rewarding longevity proved cheaper and more successful for most employers than raises and signing bonuses in reducing employee turnover).

<sup>359</sup> See Lawlor, *supra* note 358, at 55.

<sup>360</sup> See *id.* at 56, 58.

employers find that the most pressing unmet need is emergency back-up child care centers for parents whose child care arrangements break down at the last minute and for those whose children are ill and therefore cannot be taken to their regular day care centers. The 700 employee law firm of Arnold & Porter in Washington, D.C., estimates that it saved at least \$800,000 in 1993 through reduced absenteeism by providing such a backup care center for its attorneys.<sup>361</sup>

Class bias presents another pitfall. Most work/life programs are focused toward a relatively high income group of workers.<sup>362</sup> Work/family benefits of greatest value to lower-income workers may be very different, including primarily resource and referral services, employee assistance programs, and child care.<sup>363</sup> The business justification for providing services to lower-level employees differs from that which persuades businesses to offer such services to higher-waged workers. Rather than cost justifications based on the need to retain workers whose education or training makes them difficult to replace, the business justification for supporting low-waged workers typically involves customer satisfaction: Employers want service workers in hotels and restaurants to feel commitment and loyalty to the company, and so deliver quality service.<sup>364</sup>

Imposing new programs on old systems in which fundamental corporate values and societal values remain unchallenged is a recipe for failure.<sup>365</sup> In order to be effective, work/life programs must assume that workers are also caregivers—whether for their children, their spouses, their parents, or their communities—and must support them in these endeavors.

#### 4. *What Do Unions Have to Do with It?*

Organized labor can be an effective force in restructuring work at a local level through collective bargaining as well as at the political level of lobbying for legislative reform. Labor unions can, and have, made family issues union issues. Fifty-five percent of unionized workers (as opposed to thirty percent of nonunion workers) had the right to job-protected parental leave of eight weeks or more prior to passage of the FMLA.<sup>366</sup> Unions were instrumental in lobbying for the

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<sup>361</sup> See *id.* at 58.

<sup>362</sup> See *Study Reports Low-Wage Employees Benefit Less from Work-Family Programs*, Daily Lab. Rep. (BNA) No. 57, at A-4 (Mar. 25, 1998) (describing survey that found that the rigid schedules and direct contact with people or products required of many low-waged workers made the majority of work/family programs useless to them).

<sup>363</sup> See *id.*

<sup>364</sup> See Solomon, *supra* note 327, at 78.

<sup>365</sup> See *id.* at 74-75.

<sup>366</sup> LEA GRUNDY & NETSY FIRESTEIN, WORK, FAMILY, AND THE LABOR MOVEMENT 10

FMLA's passage, and many unions now use collective bargaining to extend the reach of the FMLA to employees who are not covered by its terms, to increase leave time, to provide paid family leave, and to obtain other related benefits for workers who are covered.<sup>367</sup>

Unions' original gendered focus on the family wage has evolved into an effort to obtain "living wages" for all workers, and family issues have risen in priority on union bargaining agendas.<sup>368</sup> In 1968, the AFL-CIO was instrumental in amending the Taft-Hartley Act to lift the ban against union bargaining for child care benefits.<sup>369</sup> Some of the most successful union efforts since then have involved obtaining employer-subsidized child care through collective bargaining.<sup>370</sup> Some unions have also been effective in bargaining for elder care benefits, leave for victims of domestic violence, flextime, compressed work weeks, and part-time returns to work following parental leave.<sup>371</sup>

Unions also bring into the picture an essential ingredient for success: employee voice. The groundbreaking Saturn experiment in labor-management cooperation produced a labor agreement epitomizing this; it featured work/life benefits tailored to the needs of Saturn employees who moved from all over the country to the Spring Hill, Tennessee plant, including relocation assistance and child care that met the high standards that Saturn employees were accustomed to elsewhere and which remained open 22 hours per day to accommodate shift schedules.<sup>372</sup>

Nevertheless, unions' response to the FLSA amendments considered by Congress over the past few years reveals the continuing primacy of industrial unionism: the cautious strategy of preserving jobs and relatively high wages for labor's own membership and maintaining labor market "tightness" through policies of exclusion.<sup>373</sup> If organized labor is to be a significant player on this field, it must consider a shorter-hours struggle and an effort to break down home/market barriers that would unite workers across gender and class lines and tighten the labor market for all workers.

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(Radcliffe Public Policy Institute Changing Work in America Series, 1997).

<sup>367</sup> See *id.* at 13.

<sup>368</sup> See *id.* at 11; see generally Lea Grundy & Netsy Firestein, *Bargaining for Families*, NEW LABOR FORUM, Spring 1998, at 19, 20.

<sup>369</sup> See Grundy & Firestein, *supra* note 368, at 21.

<sup>370</sup> See GRUNDY & FIRESTEIN, *supra* note 366, at 14-15 (describing child care benefit programs established by various unions through collective bargaining).

<sup>371</sup> See *id.* at 15-18.

<sup>372</sup> See John Herzfeld, *Employee-Supportive Efforts Integrated into Saturn Experiment*, Conference Told, Daily Lab. Rep. (BNA) No. 60, at A-11 (Mar. 30, 1998).

<sup>373</sup> See Aronowitz & Cutler, *supra* note 296, at 56-63.

## VI. CONCLUSION

Nostalgia for vanishing "cowboys," gender-role-bound marriages and marital permanence is widespread. While the high divorce rate and its consequences for children and adults alike is a serious social problem, the primacy of the liberal vision of romantic marriage between equals, social commitment to sex equality, and a postindustrial economy in which two incomes are essential, make it unlikely that we will retreat to the breadwinner/homemaker model of marriage anytime soon. Must a spiraling divorce rate be the inevitable byproduct of our commitment to gender equality and romantic marriage?

I have argued here that divorce, parenting deficits, and family breakdown are closely linked to the structure of market work and the values that it privileges. Paid employment in our postindustrial economy features an employer-worker relationship that eschews the permanent "until death do we part" model in favor of "serial monogamy."<sup>374</sup> We should not be surprised when our family structures and values mirror the structure and values of our postindustrial economy.

Marital strife, divorce, and the "time bind" need not be our future *if* we are willing to expand our vision and restructure paid employment to support co-provider marriages predicated on assumptions of gender equality. The blueprint for reform should be a Universal Caregiver model of employment. Two themes must be primary: reduced worktime, and the integration of paid work and family so that they support one another rather than existing in conflict.

Whether those seeking reduced worktime and integrated market and family lives are "pioneers forging the way to a new society" in the "vanguard of a post-industrial, post-employment revolution," or simply "misfits in a culture that values full-time wage work," remains to be seen.<sup>375</sup> This much, however, is clear: Rhetoric—whether about gender equality or strengthening family values—is not particularly helpful when our social institutions reinforce certain values and extinguish others. Concrete changes are needed. This Article has sought to canvass some of the possible reforms we might implement.

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<sup>374</sup> See Michael Bologna, *Labor Relations Scholars Analyze Shift in Employer-Employee Relationships*, Daily Lab. Rep. (BNA) No. 76, at A-5 (Apr. 21, 1999).

<sup>375</sup> See NEGREY, *supra* note 222, at 117.

